(25,116)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 833.

LAWRENCE MARTIN, PLAINTIFF IN ERROR,

vs.

J. D. LANKFORD AND SOUTHWESTERN SURETY INSURANCE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1916.

1 The United States of America to J. D. Lankford and Southwestern Surety Insurance Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme — of the United States, at the City of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an order allowing a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein Lawrence Martin is plaintiff and you are defendants to show cause, if any there be, why the judgment rendered against the said plaintiff as in said Writ of Error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral Judge of the District Court of the United States for the Western District of Oklahoma this 10 day of January A. D., 1916.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

I, S. P. Freeling, Att'y of record for the Defendants in Error in the above case, hereby accept service of above citation.

January 15, 1916.

S. P. FREELING,
Att'y Gen. of Okla. and Att'y for Def'ts in Error.

[Endorsed:] No. 1513. Lawrence Martin vs. J. D. Lankford et al. Citation. Filed Jan. 10, 1916. Arnold C. Dolde, clerk. By M. V. Haws, deputy.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Oklahoma, Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the December Term, 1915, thereof, between Lawrence Martin as plaintiff and J. D. Lankford and Southwestern Surety Insurance Company as defendants a manifest error hath happened, to the great damage of the said plaintiff as by petition appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City

of Washington, D. C., and filed in the office of the Clerk of the said Court *of* on or before the 9th day of February, 1916, to the end that the record and proceedings aforesaid being inspected, the said Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 10th day of January in the year of our Lord one thousand nine hundred and sixteen.

Issued at office in Guthrie with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States,
Western District of Oklahoma.

Allowed by:
JOHN H. COTTERAL, *Judge.*

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the Western District of Oklahoma.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States,
Western District of Oklahoma.

[Endorsed:] No. 1513. Filed January 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

3 In the District Court of the United States for the Western District of Oklahoma.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Petition.

Comes now the plaintiff and shows to the court that he is a citizen of the city of Chickasha, in the County of Grady in the Eastern District of the State of Oklahoma; that the defendant J. D. Lankford is a citizen of the City of Oklahoma City in the County of Oklahoma, of the Western District of the State of Oklahoma; that the defendant, the Southwestern Surety Insurance Company is a corporation, incorporated, organized and existing under the laws of the State of Oklahoma, and doing business therein, and is a citizen of Bryan County in the Eastern District of the State of Oklahoma, with its principal place of business located at Denson, said county, authorized to operate and operating under the laws of said state a Fidelity Insurance business at each and all of the times named herein.

That on the 1st day of March, 1911, the said defendant, J. D. Lankford was then and there Bank Commissioner of the State of Oklahoma, and the defendant J. D. Lankford and defendant Southwestern Surety Insurance Company on said date entered into an official Fidelity bond of said J. D. Lankford as Bank Commissioner in the sum of $25,000 to the State of Oklahoma and other persons interested therein, the conditions of said obligation being among other things, that he, the said J. D. Lankford should faithfully and impartially, without fear, favor, fraud, or oppression, discharge the duties that then or thereafter might be required of his office by law; that said bond was duly approved by the then
4 Governor of the State of Oklahoma and filed in the office of the Secretary of State as required by law and a true copy thereof with all endorsements thereon is hereto attached, marked Exhibit A, and made a part hereof.

That thereafter about the 19th day of March, 1911 the said J. D. Lankford was duly reappointed Bank Commissioner of said state and continued in said office, having held the same continuously from said 1st day of March, 1911, and thereupon, he — the said defendant, Southwestern Surety Insurance Company entered into another bond in exactly the same terms and conditions being a continuation of the former bond, the original of Exhibit A. and said second bond was signed, executed and delivered on the 19th day of March, 1915, and duly approved by the Governor of said state on the 8th day of April, 1915, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof, and by the terms thereof among other things, the said defendants jointly and sev-

erally promised that the said J. D. Lankford shall faithfully discharge all the duties required of him by law as bank commissioner.

That on the 1st day of October, 1913, the Farmers & Merchants Bank of Mountain View of Oklahoma, was a banking corporation incorporated, organized and operating in said State of Oklahoma in Kiowa County, in said State, under the control and supervision of the said J. D. Lankford as bank commissioner up to and until the 20th day of February, 1915, when as hereinafter more fully stated, he the said Bank Commissioner took possession of said Farmers & Merchants Bank and its assets because of its insolvency and has since had the books, papers, and assets belonging to the property of said bank in his possession as such bank commissioner; that at the time said bank commissioner took possession of said bank the said plaintiff was a stockholder in said bank, owning stock to the extent of $2,000, and of the par value of $2,000, and as such he then and there was liable to the sum of $2,000 upon his stockholder's liability; that the said bank commissioner has agreed to offset said stockholder's liability of $2,000 against any sums that may be owing to the plaintiff because of the matters and things herein set forth, but that the said Bank Commissioner fails and refuses to pay any part of the balance thereon owing to the plaintiff as hereinafter more fully set out, as follows:

First Cause of Action.

Plaintiff repeats the general allegations preceding the first cause of action as though the same were herein set down again in the same words and figures and says further:

That on the 1st day of October, 1913, the plaintiff deposited certain moneys with the said Farmers & Merchants Bank at Mountain View in Kiowa County in said State of Oklahoma, as a general checking deposit. From then on until the closing of said bank on the 20th of February, 1915, he made frequent and continual deposits therein and checked upon the same; that the dates and amounts of the deposits made and the checks drawn against the same cannot be stated by the plaintiff in detail, but are known in detail to the defendant J. D. Lankford, Bank Commissioner, in that he has custody and control over the books and assets of said bank; that plaintiff says on the 20th day of February, 1915, when the said J. D. Lankford as bank commissioner took possession of said bank, there remained to his credit on the said deposit a certain sum of money, the exact amount of which cannot be stated by the plaintiff, but he is informed and so alleges the fact to be and verily believes that the amount thereof was between $300.00 and $500.00; that he has repeatedly requested the bank commissioner to make an audit of the said account and to pay the balance due thereon, as required by law, but that the said bank commissioner has refused and failed either to make an audit of the same and acquaint plaintiff with the amount thereof, or to pay the balance owing thereon to the plaintiff to his injury in a sum, the exact amount of which is unknown but of about the sum of $500.00.

6 That since the 8th day of April, 1915, the plaintiff has repeatedly demanded and requested the said J. D. Lankford, the said Bank Commissioner, the said audit of said account and the payment to him of the amount due thereon, as is required by law of the said J. D. Lankford, Bank Commissioner, and that it then and there was the duty of the said J. D. Lankford as Bank Commissioner of said state to audit the said account and to pay the amount owing on said account to the said plaintiff, but the said J. D. Lankford in violation of his duty as bank commissioner entirely fails and refuses to make any audit of said account and to acquaint the plaintiff with the result thereof or to pay to the said plaintiff the said sum of $500.00 or any part thereof.

Plaintiff states that under the terms of said bonds Exhibits A, and B. it was the duty of said J. D. Lankford, as Bank Commissioner of said state to pay the amount owing on said deposit at the time the plaintiff demanded and requested the audit of said deposit and the payment of the amount owing thereon, to him after the 8th day of April, 1915, or about said date, but the defendant, J. D. Lankford, in violation of his duty as bank commissioner fails and refuses to pay the same or any part thereof, that he has violated the terms of said bonds in this to-wit: that he has neither faithfully nor fully performed his duty as bank commissioner in this: That it is and was the duty of said Bank Commissioner to pay said deposit on demand: that said J. D. Lankford as bank commissioner, grossly and entirely failed to perform his duty as bank commissioner in the supervision and control of said Farmers & Merchants Bank in that though duly informed of the conditions existing in said bank, and having actual knowledge of such facts as would put a reasonable man upon inquiry, he allowed the persons in charge of said bank to squander its assets so as to damage the plaintiff in his right to compel payment from said bank, and that the failure to exercise proper care and supervision by said J. D. Lankford consisted principally in this, that before the time of the making of the said deposit and from then continuously up to the time that the said J. D. Lankford took possession of said bank because
7 of its insolvency, he, said J. D. Lankford, with full knowledge of the situation, permitted the persons in charge of said bank to conduct it while its reserve was less than that required by law, and failed to take possession of said bank for the purpose of enforcing said law, or to do anything else adequate and requisite in the premises, that he, said J. D. Lankford, as bank commissioner allowed the persons in charge of said bank, before the making of said deposit and thence continuously until the time that he took charge of said bank, for its insolvency, to make excessive loans in violation of the law and thereby to squander the assets of the bank to the plaintiff's detriment; that he, said J. D. Lankford before the making of the said deposit and thence continuously until the time he took possession of the said bank allowed the persons in charge of said bank to squander its assets by allowing the making of overdrafts; that he the said J. D. Lankford as bank commissioner, before the time of the making of the said deposit and thence continu-

ously until the time the said bank had become wholly insolvent, and only sixty days before the time that he, the said J. D. Lankford took possession of same for its insolvency, well knew that the management of said bank was in the hands of incompetent, and inefficient persons and allowed the same to be controlled and managed by them inefficiently, incompetently and without economy to the great damage of the assets of said bank. And such squandering of assets thus occurred in such amount as to deprive the plaintiff of all opportunity of recovering the same out of the property of the bank.

Plaintiff states that the said bank commissioner was by law authorized to visit every domestic bank chartered under the laws of the State of Oklahoma and it was his duty either in person or by his assistants, to visit the same at least twice each year and as much oftener as was advisable, for the purpose of making a full and careful examination and inquiry into the conditions of affairs of such bank, and for that purpose, the bank commissioner and his assistants were by law authorized and empowered to administer oaths and to examine under oath the stockholders and directors or officers and employees and agents of such bank, or other persons,
8 and that the commissioner was by law required to reduce the result of such examination to writing and that the law directs that such writing should contain a full, true, and correct statement of the condition of such bank and that the same should be filed and retained in his office, and thereby the said bank commissioner had the means of learning and did actually know all of the matters heretofore stated; that the law authorized the bank commissioner to call for reports under oath from the officers of the bank at least four times a year and as much oftener as he deemed it necessary.

Under the laws of the State of Oklahoma, every bank doing business under said laws therein, was required to have on hand at all times an available fund of the following sums, to-wit: Banks located in towns or cities having a population of less than twenty five hundred persons, an amount equal to twenty per cent of their entire deposits; that the town of Mountain View in which said Farmers & Merchants Bank was operating, was of less than twenty five hundred persons at each and all of the times named herein, but that said bank never from the time of the making of said deposit until the time that the bank commissioner took possession of the same, at any time had available funds in an amount equal to twenty per cent of the amount of its entire deposits. That under the law of the State of Oklahoma, applicable to such bank whenever the reserve of any such bank should be below the required amount of available funds, the law prohibited the making of any new loans or discounts, otherwise than in the discounting of bills of exchange payable at sight, but that said provision of law was by said bank from the time of the making of said deposit until the time that the said bank commissioner took possession of same, continously and notoriously violated as the said J. D. Lankford, bank commissioner then and there well new.

That under the provision of law applicable thereto the said bank commissioner was required by law to notify any bank, whose legal money reserve should be below the amount required to be kept on hand, and if the bank should fail to repair the same for a period of thirty days after such notice, under the law such bank was to be deemed insolvent, and it was the duty of such bank commissioner to take possession of the same and proceed to liquidate the
9 same as provided by law for the liquidation of insolvent banks that though the said bank commissioner frequently made demands upon said bank to repair its said reserve, that the said reserve was never repaired in fact and that said bank repeatedly and habitually failed to repair the same within thirty days as the said bank commissioner well knew and had reasonable cause to believe, and ample opportunity to discover, and it thereupon became the duty of the said bank commissioner to take possession of said bank before the time that said deposit was made and at all the times thereafter until the time that he took possession of the same in February, 1915, but this duty was by him, in violation of his said bond, without just excuse, continuously postponed and delayed until the month of February, 1915, when the assets of said bank were so squandered and depleted as to be insufficient to pay the claim of the plaintiff.

Under the law of the State of Oklahoma applicable thereto it was provided that the total liabilities to any bank of any person, corporation, or firm, for money borrowed, including in the liabilities of such company or firm the liabilities of the several stockholders, officers, or members thereof, should not at any time exceed twenty per cent of the capital stock of such bank, that the capital stock of the said Farmers & Merchants Bank was the sum of $10,000 but as the said bank commissioner well knew, the officers and persons in control of said bank before the making of the said deposit, and thence continuously until a short time before the bank commissioner took possession of the same, loaned from its funds, more than twenty per cent of the capital stock of said bank; that these violations of law were habitually and continuous as the said bank commissioner well knew, and thereupon it became the duty of the said bank commissioner to take possession of the said bank and liquidate the same as insolvent and that without justifiable cause or excuse in violation of his duty as bank commissioner, and in violation of his said bond, he postponed and delayed taking possession of said bank until the — day of February, 1915, and until the assets of said bank were so squandered and depleted as to leave insufficient to pay the claim of said plaintiff.

10 That before the time that said deposit was made, the said Farmers & Merchants' Bank was insolvent; that the market value of its assets were insufficient to pay its liabilities, that it was unable to meet the demands of its creditors in the usual and customary manner and that it was unable to make good its reserve as required by law, and that each of these things were to the said bank commissioner well known or he had ample and full opportunity to learn the same, and that it was his duty before the making of said deposit to have taken possession of said bank for insolvency. That

because of such excessive loans, such habitual overdrafts, such failure to keep the reserve required by law, and such inefficient management and such insolvency of said bank as aforesaid, the capital stock of said bank became impaired as the said J. D. Lankford bank commissioner well knew, and it thereupon became the duty of said bank commissioner to cause the same to be repaired or to take possession of said bank at once, and that neither of said things were done by said bank commissioner, and the said bank was allowed to continue in the wasting of its said assets until insufficient remained to repay plaintiff, and thereby damaging the plaintiff in said sum.

That finally in the month of February, 1915, the said bank commissioner took possession of said bank because of its insolvency and proceeded to take possession of all its assets and to wind up its affairs as a bank, to collect its dues and to pay its debts and thereupon in due course the claim of the said plaintiff under said deposit was demanded of said bank commissioner and without justifiable excuse by him, disallowed, and payment thereof refused in violation of law and in violation of the aforesaid bonds made by him, said J. D. Lankford, by them, the said Southwestern Surety Insurance Company, as surety for him; and that said refusal was wrongful, willful and oppressive, and was an abuse of the discretion vested in him as bank commissioner in that there was no cause whatever to question the validity of said claim, but on the contrary all of the facts which he the said Lankford had before him in regard thereto showed the same to be a valid and legal claim against the depositor's guaranty fund of the state of Oklahoma.

11 That the law of the State of Oklahoma requires that when a bank under its laws becomes insolvent, that the bank commissioner shall take possession of same, and pay its depositors in full, and when the cash available in said bank, or that can be made immediately available for that purpose is not sufficient to discharge its obligations to its depositors, it is provided by law that the banking board of the State of Oklahoma shall draw from the depositors' guaranty fund and place subject to the use of the bank commissioner the amount necessary to make up the deficiency and that the State of Oklahoma shall have for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank, and all liabilities against the stockholders, officers, or directors of said bank and against all other persons, corporations, or firms for the advance so made from the said depositors' guaranty fund, and that all such liabilities shall be enforced by the state for the benefit of said depositors' guaranty fund and that by reason of said provision of law after the said J. D. Lankford, bank commissioner, took possession of said bank, the State of Oklahoma, thereby acquired a first lien upon all the assets of the said bank to recoupe the advanced amount necessary to be made from said depositors' guaranty fund, and that under the said law it is the duty of the said bank commissioner to pay the amount owing on the deposit to the said plaintiff, and to recoupe the same out of the assets of said bank under the said provisions of law as aforesaid.

That the enforcement of the said laws of the State of Oklahoma, in the matters herein complained of were and are solely through and by

said defendant, J. D. Lankford as Bank Commissioner and the same have been in this case interpreted and enforced by him in such wise as to deny this plaintiff the equal protection of the laws in violation of the 14th amendment to the Constitution of the United States, in this,—that said Bank Commissioner arbitrarily, capriciously and without legal justification has interpreted and enforced said laws as investing him with the arbitrary power to determine what deposits shall be paid out of said available assets of said failed bank
12 and what out of said depositors' guaranty fund and to make this determination unequally and not under the equal protection of the law in that he has determined as aforesaid that no payment or payments shall be made out of the available assets of said failed bank in his possession to plaintiff or out of the said depositors' guaranty fund in satisfaction of said deposit of plaintiff but that other and different depositors of said failed bank with no greater or different rights, whose claims and the amounts of whose deposits are unknown to the plaintiff but known to the said defendant Bank Commissioner, but of the same class and legal condition and situation as the deposit of this plaintiff, were and have been paid by him both out of the available cash resources of said failed bank and out of said depositors' guaranty fund, and for this said law as thus enforced affords the plaintiff no remedy for correction of said determination by judicial review and thereby gives to said other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage.

Further said Bank Commissioner having arbitrarily and capriciously and without justification therefor, illegally determined what deposits shall be paid out of the available cash assets of said failed bank, and for what deposits advancements shall be made from the depositors' guaranty fund, does and did also to plaintiff's damage likewise capriciously and arbitrarily interpret and enforce said laws, so that he, said defendant Bank Commissioner, determined for himself for what amount he shall and should and does hold the assets of said failed bank and does and did impress upon the assets of said failed bank said first lien for recoupement to the State of Oklahoma ahead of and superior to the lien of plaintiff thereon, in so large a sum that said assets are insufficient to pay the same or to leave anything to repay plaintiff for his said debt. And because the State of Oklahoma is immune from suit by plaintiff, he has no remedy by judicial review to correct such illegal determination by defendant Bank Commissioner, either of the superiority of any of said other preferred creditors or of the whole or aggregate amount thereof as represented in said preferred liens to the State, ahead of plaintiff's liens thereby he, said defendant J. D. Lankford acting for
13 said State as Bank Commissioner, deprives and deprived plaintiff of his property without due process of law in violation of the 14th amendment to the Constitution of the United States, by illegally disallowing plaintiff's claim and illegally allowing said other illegally preferred depositors and giving them and the State of Oklahoma in lieu of them, said first lien aforesaid, and in all of

these matters thereby breaching the said obligation in said bonds, Exhibits A. and B. aforesaid.

Therefore by failure to perform the promises made for the benefit of this plaintiff in the said bonds, Exhibits A. and B. the said plaintiff was by the defendants damaged in a sum the exact amount of which is unknown but which will be disclosed by the audit of said account aforesaid, which the plaintiff believes to be between the sum of $300.00 and $500.00, together with six per cent interest thereon until the same shall be paid, from the 20th day of February, 1915.

Plaintiff was entirely without knowledge, notice or information of any of the matters or things above stated as to the insolvency and improper condition of said bank until the affairs of said bank had reached a condition in which they were totally incapable of repaying plaintiff the said deposit and that the failure to collect the said deposit has been lost through no fault of plaintiff; that the plaintiff was informed and believed that the said J. D. Lankford bank commissioner was giving great care and attention to the affairs of said bank as it was his duty to do, and made deposit and allowed the same to remain in said bank relying upon the full performance by defendant as bank commissioner of his said duties.

14 *Second Cause of Action.*

Plaintiff states that he repeats the general allegations preceding the first cause of action as though the same were herein set down again in the same words and figures and says further:

That on the 10th of June, 1913, said Farmers & Merchants Bank of Mountain View, Oklahoma, for value received and money therein deposited by him the said plaintiff, made, executed and delivered to this plaintiff a certificate of deposit whereby it promised to pay to this plaintiff in seven months from date the sum of Twenty Five Hundred Dollars ($2,500.00), with four per cent interest thereon, upon return of the certificate properly endorsed and returned; that on the 20th day of February, 1915, as hereinafter more fully set out the said Bank Commissioner took possession of said Farmers & Merchants Bank and of its assets because of its insolvency and thereupon the said certificate of deposit was by the plaintiff endorsed and duly presented to said bank commissioner for payment, and thereupon, after the 8th of April, 1915, and before the bringing of this action, payment of the same was refused that said certificate together with all endorsements thereon, is hereto attached, marked "Exhibit C," and made a part hereof.

Plaintiff states that under the terms of said bonds Exhibits A. and B. it was the duty of said J. D. Lankford, as bank commissioner of said State, to pay the amount owing on said certificate at the time the same was presented to him in February 1915, and that on the date the same was presented to him, about the 20th of February, 1915, there was due the sum of $2,675.00, and that since the presentation of the said certificate for payment, the same has drawn six per cent interest, and on the 20th day of August, 1915,

there will be due upon the same, the sum of $— together with six per cent interest upon the same until paid.

Plaintiff has duly made demand upon the defendant, J. D. Lankford to pay the same, but the defendant, J. D. Lankford, in
15 violation of his duty as bank commissioner fails and refuses to pay the same or any part thereof, that he has violated the terms of said bonds in this towit: that he has neither faithfully nor fully performed his duty as bank commissioner in this: That it is and was the duty of said bank commissioner to pay said certificate of deposit upon presentation; that said J. D. Lankford as bank commissioner, grossly and entirely failed to perform his duty as bank commissioner in the supervision and control of said Farmers & Merchants Bank in that though duly informed of the conditions existing in said bank, and having actual knowledge of such facts as would put a reasonable man upon inquiry, he allowed the persons in charge of said bank to squander its assets so as to damage the plaintiff in his right to compel payment from said bank, and that the failure to exercise proper care and supervision by said J. D. Lankford consisted principally in this, that before the time of the making of the said certificate of deposit, and from then continuously up to the time that the said J. D. Lankford took possession of said bank bec-use of its insolvency, he, said J. D. Lankford, with full knowledge of the situation, permitted the persons in charge of said bank to conduct it while its reserve was less than that required by law, and failed to take possession of said bank for the purpose of enforcing said law, or to do anything else adequate and requisite in the premises, that he, said, J. D. Lankford, as said bank commissioner allowed the persons in charge of said bank, before the making of said certificate, and thence continuously until the time that he took charge of said bank, for its insolvency to make excessive loans in violation of the law and thereby to squander the assets of the bank to the plaintiff's detriment; that he, said J. D. Lankford before the making of the said certificate, and thence continuously until the time he took possession of the said bank allowed the persons in charge of said bank to squander its assets by allowing the making of overdrafts; that he the said J. D. Lankford as bank commissioner, before the time of the making of the said certificate and thence continuously until the time the said bank had become
16 wholly insolvent, and only sixty days before the time that he, the said J. D. Lankford took possession of same for its insolvency, well knew that the management of said bank was in the hands of incompetent, and inefficient persons and allowed the same to be controlled and managed by them inefficiently, incompetently and without economy to the great damage of the assets of said bank. And such squandering of assets thus occurred in such amount as to deprive the plaintiff of all opportunity of recovering the same out of the property of the bank.

Plaintiff states that the said bank commissioner was by law authorized to visit every domestic bank chartered under the law of the State of Oklahoma, and it was his duty either in person or by his assistants, to visit the same at least twice each year and as much

oftener as was advisable, for the purpose of making a full and careful examination and inquiry into the conditions of affairs of such bank, and for that purpose, the bank commissioner and his assistants were by law authorized and empowered to administer oaths and to examine under oath the stockholders and directors or officers and employees and agents of such bank, or other persons, and that the commissioner was by law required to reduce the result of such examination to writing and that the law directs that such writing should contain a full, true, and correct statement of the condition of such bank and that the same should be filed and retained in his office, and thereby the said bank commissioner had the means of learning and did actually know all of the matters heretofore stated; that the law authorized the bank commissioner to call for reports under oath from the officers of the bank at least four times a year and as much oftener as he deemed it necessary.

Under the laws of the State of Oklahoma, every bank doing business under said laws therein, was required to have on hand at all times an available fund of the following sums, to-wit: Banks located in towns or cities having a population of less than twenty five hundred persons, an amount equal to twenty per cent of their entire deposits; that the town of Mountain View in which said Farmers & Merchants Bank was operating, was of less than twenty five hundred persons at each and all of the times named herein, but that said bank never from the time of the making of said certificate until the time that the bank commissioner took possession
17 of the same, at any time had available funds in an amount equal to twenty per cent of the amount of its entire deposits. That under the law of the state of Oklahoma, applicable to such bank, whenever the reserve of any such bank should be below the required amount of available funds, the law prohibited the making of any new loans or discounts, otherwise than in the discounting of bills of exchange payable at sight, but that said provision of law was by said bank from the time of the making of said certificate until the time that the said bank commissioner took possession of same, continuously and notoriously violated as the said J. D. Lankford bank commissioner then and there well knew.

That under the provision of law applicable thereto the said bank commissioner was required by law to notify any bank, whose legal money reserve should be below the amount required to be kept on hand, and if the bank should fail to repair the same for a period of thirty days after such notice under the law, such bank was to be deemed insolvent, and it was the duty of such bank commissioner to take possession of the same and proceed to liquidate the same as provided by law for the liquidation of insolvent banks; that though the said bank commissioner frequently made demands upon said bank to repair its said reserve, that the said reserve was never repaired in fact and that said bank repeatedly and habitually failed to repair its said reserve within thirty days as the said bank commissioner well knew and had reasonable cause to believe, and ample opportunity to discover, and it thereupon became the duty of the said bank commissioner to take possession of said bank before the

time that said certificate was issued, and at all the times thereafter until the time that he took possession of the same in February, 1915, but this duty was by him, in violation of his said bond, without just excuse, continually postponed and delayed until the month of February, 1915, when the assets of said bank were so squandered and depleted as to be insufficient to pay the claim of the plaintiff.

Under the law of the state of Oklahoma applicable thereto it was provided that the total liabilities to any bank of any person, corporation, or firm, for money borrowed, including in the
18 liabilities of such company or firm the liabilities of the several stockholders, officers, or members thereof, should not at any time exceed twenty per cent of the capital stock of such bank, that the capital stock of the said Farmers & Merchants Bank was the sum of $10,000 but as the said bank commissioner well knew, the officers and persons in control of said bank before the making of the said certificate, and thence continuously until a short time before the bank commissioner took possession of the same, loaned from its funds more than twenty per cent of the capital stock of said bank; that these violations of law were habitual and continuous as the said bank commissioner well knew, and thereupon it became the duty of the said bank commissioner to take possession of the said bank and liquidate the same as insolvent, and that without justifiable cause or excuse in violation of his duty as bank commissioner, and in violation of his said bond, he postponed and delayed taking possession of said bank until the — day of February, 1915, and until the assets of said bank were so squandered and depleted as to leave insufficient to pay the claim of said plaintiff.

That before the time that said certificate was issued the said Farmers & Merchants Bank was insolvent; that the market value of its assets were insufficient to pay its liabilities, that it was unable to meet the demands of its creditors in the usual and customary manner and that it was unable to make good its reserve as required by law, and that each of these things were to the said bank commissioner well known or he had ample and full opportunity to learn the same, and that it was his duty before the making of said certificate to have taken possession of said bank for insolvency. That because of such excessive loans, such habitual overdrafts, such failure to keep the reserve required by law, and such inefficient management and such insolvency of said bank as aforesaid, the capital stock of said bank became impaired as the said J. D. Lankford bank commissioner, well knew, and it thereupon became the duty of said bank commissioner to cause the same to be repaired or to take possession of said bank at once, and that neither of said things were done by said bank commissioner, and the said bank was allowed to continue in the wasting of its said assets
19 until insufficient remained to repay plaintiff and thereby damaging the plaintiff in said sum.

That finally in the month of February, 1915, the said bank commissioner took possession of said bank because of its insolvency and proceeded to take possession of all of its assets and to wind up its affairs as a bank, to collect its dues and to pay its debts and there-

upon in due course the claim of the said plaintiff under said certificate was presented to said bank commissioner and without justifiable excuse by him, disallowed, and payment thereof refused in violation of law and in violation of the aforesaid bonds made by him, said J. D. Lankford, by them, the said Southwestern Surety Insurance Company as surety for him; and that said refusal was wrongful, willful, and oppressive, and was an abuse of the discretion vested in him as bank commissioner in that there was no cause whatever to question the validity of said claim, but on the contrary all of the facts which he the said Lankford had before him in regard thereto showed the same to be a valid and legal claim against the depositor's guaranty fund of the State of Oklahoma.

That the law of the State of Oklahoma requires that when a bank under its laws becomes insolvent, that the bank commissioner shall take possession of same, and pay its depositors in full, and when the cash available in said bank, or that can be made immediately available for that purpose is not sufficient to discharge its obligations to its depositors, it is provided by law that the banking board of the State of Oklahoma shall draw from the depositors' guaranty fund and place subject to the use of the bank commissioner the amount necessary to make up the deficiency and that the state of Oklahoma shall have for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank, and all liabilities against the stockholders, officers, or directors of said bank and against all other persons corporations, or firms, for the advance so made from the said depositors' guaranty fund, and that all such liabilities shall be enforced by the state for the benefit of said depositors' guaranty fund and that by reason of said provision of law after the said J. D. Lankford, bank commissioner, took possession of said bank, the State of Oklahoma, thereby acquired a first lien upon all the assets of the said bank to recoup the advanced amount necessary to be made from said depositors' guaranty fund, and that under the said law it is the duty of the said bank commissioner to pay the amount owing on the certificate to the said plaintiff, and to recoup the same out of the assets of said bank under the said provisions of law as aforesaid.

That the enforcement of the said laws of the State of Oklahoma, in the matters herein complained of were and are solely through and by said defendant, J. D. Lankford, as bank commissioner and the same have been in this case interpreted and enforced by him in such wise as to deny this plaintiff the equal protection of the laws in violation of the 14th amendment to the Constitution of the United States in this--that said Bank Commissioner arbitrarily, capriciously and without legal justification has interpreted and enforced said laws as investing him with the arbitrary power to determine what deposits should be paid out of said available assets of said failed bank and what out of said depositors' guaranty fund and to make this determination unequally and not under the equal protection of the law in that he has determined as aforesaid that no payment or payments shall be made out of the available assets of said failed bank in his possession to plaintiff or out of the said

depositors' guaranty fund in satisfaction of said certificate of plaintiff, but that other and different depositors of said failed bank with no greater or different rights, whose claims and the amounts of whose deposits are unknown to the plaintiff but known to the said defendant Bank Commissioner, but of the same class and legal condition and situation as the deposit of this plaintiff, were and have been paid by him both out of the available cash resources of said failed bank and out of said depositors' guaranty fund, and for this, said law as thus enforced affords the plaintiff no remedy for correction of said determination by judicial review and thereby gives to said other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage.

21 Further said bank commissioner having arbitrarily and capriciously and without justification therefor, illegally determined what deposits shall be paid out of the available cash assets of said failed bank, and for what deposits advancements shall be made from the depositors' guaranty fund, does and did also to plaintiff's damage likewise capriciously and arbitrarily interpret and enforce said laws, so that he, said defendant Bank Commissioner, determined for himself for what amount he shall and should and does hold the assets of said failed bank and does and did impress upon the assets of said failed bank said first lien for recoupement to the State of Oklahoma, ahead of and superior to the lien of plaintiff thereon, in so large a sum that said assets are insufficient to pay the same or to leave anything to repay plaintiff for his said debt. And because the state of Oklahoma is immune from suit by plaintiff he has no remedy by judicial review to correct such illegal determination by defendant bank commissioner, either of the superiority of any of said other preferred creditors or of the whole or aggregate amount thereof as represented in said preferred liens to the state, ahead of plaintiff's liens thereby he, said defendant J. D. Lankford acting for said state as bank commissioner, deprives and deprived plaintiff of his property without due process of law in violation of the 14th amendment to the Constitution of the United States, by illegally disallowing plaintiff's claim and illegally allowing said other illegally preferred depositors and giving them and the state of Oklahoma in lieu of them, said first lien aforesaid, and in all of these matters thereby breaching the said obligation in said bonds Exhibits A and B aforesaid.

Therefore by failure to perform the promises made for the benefit of this plaintiff in the said bonds, Exhibits A and B, the said plaintiff has been by the defendants, damaged in the sum of $2,675.00 on the 20th day of February, 1915, together with six per cent interest thereon, until the same shall be paid, amounting on the 20th of August, 1915, to the sum of $—.

22 Plaintiff was entirely without knowledge, notice or information, of any of the matters or things above stated until thirty days before the said Commissioner took possession of said bank when the condition of said bank was so entirely insolvent as to entirely incapacitate it from ability to repay said certificate, except

such as appeared upon the face of said certificate when he received the same, and the fact that he knew of the existence of a bank commissioner, charged in general with the duties and powers aforesaid and because of this knowledge and because of this lack of knowledge relying upon the full performance by the defendant, bank commissioner of his duties, the plaintiff without fault on his part, allowed the moneys represented by said certificate to remain in said bank after the same became due, and upon said certificate nothing has ever been paid or allowed by way either of principal or interest.

Third Cause of Action.

That on the 8th day of August, 1913, the said plaintiff deposited with the Farmers & Merchants Bank of Mountain View the sum of Five Thousand Dollars ($5,000.00) good and lawful money of the United States of the value of $5,000 and received from the then acting officers of said bank a certain paper which the plaintiff believed to be and was informed was a certificate of deposit for said sum, which said paper instead purports upon its face to be a note for the sum of $5,000 signed by the said bank and its then managing officer, instead of being in the usual form of a certificate of deposit, but that the plaintiff received the same as a certificate of deposit: that a copy of said certificate of deposit with all endorsements thereon, marked Exhibit D, is hereto attached and made a part hereof; that the said plaintiff retained the said paper among his certificates of deposit believing and relying upon the same as being a certificate of deposit, and he never consented that the said deposit should be converted into a note; that the said note is long since past
23 due, and has never been paid in any way whatsoever; that the plaintiff retained said paper among his certificates of deposits as aforesaid until about the 20th of January, 1915, when having learned something about the unsafe condition of said bank, he then for the first time examined his said paper and discovered that the said paper was a note instead of a certificate of deposit; that he then learned that the condition of said bank was so absolutely insolvent as to be entirely incapable of repaying him his said certificate of deposit and at that time the said L. C. West, who executed the said certificate of deposit as President of said bank and for it, was no longer president of said bank, and was without authority to make, modify or change any of the papers or books of said bank and that thereupon the plaintiff demanded and requested the defendant, J. D. Lankford to take possession of said bank and liquidate the same as required by law, and to pay the said certificate of deposit.

Thereafter on the 20th day of February, 1915, as hereinafter more fully stated, the said bank commissioner took possession of said Farmers & Merchants Bank of Mountain View and of its assets because of its insolvency, and thereupon the said certificate of deposit was by the owner and holder thereof, this plaintiff, duly presented to said bank commissioner for payment and that payment

thereof was refused as hereinafter more fully stated; the said certificate together with all endorsements thereon is attached hereto, marked Exhibit D, and made a part hereof.

Plaintiff states that under the terms of said bonds Exhibits A and B, it was the duty of said J. D. Lankford, as Bank Commissioner of said State, to pay the amount owing on said certificate at the time the same was presented to him in February, 1915, and that on the date the same was presented to him about the 20th of February, 1915, there was due the sum of $5,300.00, and that since the presentation of the said certificate for payment, the same has drawn six per cent interest, and on the 20th of August, 1915, there will be due upon the same, the sum of $—, together with six per cent interest upon the same until paid.

Plaintiff has duly made demand upon the defendant, J. D. Lankford to pay the same, but the defendant, J. D. Lankford, in
24 violation of his duty as bank commissioner fails and refuses to pay the same or any part thereof, that he has violated the terms of said bonds in this towit: that he has neither faithfully nor fully performe- his duty as bank commissioner in this: that it is and was the duty of said bank commissioner to pay said certificate upon presentation that said J. D. Lankford as bank commissioner, grossly and entirely failed to perform his duty as bank commissioner in the supervision and control of said Farmers & Merchants Bank in that though duly informed of the conditions existing in said bank, and having actual knowledge of such facts as would put a reasonable man upon inquiry he allowed the persons in charge of said bank to squander its assets so as to damage the plaintiff in his right to compel payment from said bank, and that the failure to exercise proper care and supervision by said J. D. Lankford consisted principally in this, that before the time of the making of the said certificate of deposit and from then continuously up to the time that the said J. D. Lankford took possession of said bank because of its insolvency, he, said J. D. Lankford, with full knowledge of the situation, permitted the persons in charge of said bank to conduct it while its reserve was less than that required by law, and failed to take possession of said bank for the purpose of enforcing said law, or to do anything else adequate and requisite in the premises, that he said J. D. Lankford, as said Bank Commissioner allowed the persons in charge of said bank, before the making of said certificate, and thence continuously until the time that he took charge of said bank, for its insolvency, to make excessive loans in violation of the law and thereby to squander the assets of the bank to the plaintiff's detriment; that he, said J. D. Lankford before the making of the said certificate and thence continuously until the time he took possession of the said bank allowed the persons in charge of said bank to squander its assets by allowing the making of overdrafts; that he the said J. D. Lankford as bank commissioner, before the time of the making of the said certificate and thence continuously until the time the said bank had become wholly insolvent, and only sixty

days before the time that he, the said J. D. Lankford took
25 possession of same for its insolvency, well knew that the management of said bank was in the hands of incompetent, and inefficient persons and allowed the same to be controlled and managed by them inefficiently, incompetently and without economy to the great damage of the assets of said bank. And such squandering of assets thus occurred in such amount as to deprive the plaintiff of all opportunity of recovering the same out of the property of the bank.

Plaintiff states that the said bank commissioner was by law authorized to visit every domestic bank chartered under the laws of the State of Oklahoma and it was his duty either in person or by his assistants, to visit the same at least twice each year and as much oftener as was advisable, for the purpose of making a full and careful examination and inquiry into the conditions of affairs, of such bank, and for that purpose, the bank commissioner and his assistants were by law authorized and empowered to administer oaths and to examine under oath the stockholders and directors or officers and employees and agents of such bank, or other persons, an- that the commissioner was by law required to reduce the result of such examination to writing and that the law directs that such writing should contain a full, true and correct statement of the condition of such bank and that the same should be filed and retained in his office, and thereby the said bank commissioner had the means of learning and did actually know all of the matters hereto forestated; that the law authorized the bank commissioner to call for reports under oath from the officers of the bank at least four times a year and as much oftener as he deemed it necessary.

Under the laws of the State of Oklahoma, every bank doing business under said laws therein, was required to have on hand at all times an available fund of the following sums, to-wit: Banks located in towns or cities having a population of less than twenty five hundred persons, an amount equal to twenty per cent of their entire deposits; that the town of Mountain View which said Farmers & Merchants Bank was operating, was of less than twenty five hundred persons at each and all of the times named herein, but that said bank never from the time of the making of said certifi-
26 cate until the time that the bank commissioner took possession of the same, at any time had available funds in an amount equal to twenty per cent of the amount of its entire deposits. That under the law of the state of Oklahoma, applicable to such bank whenever the reserve of any such bank should be below the required amount of available funds, the law prohibited the making of any new loans or discounts, otherwise than in the discounting of bills of exchange, payable at sight, but that said provision of law was by said bank from the time of the making of said certificate until the time that the said bank commissioner took possession of same, continuously and notoriously violated as the said J. D. Lankford, bank commissioner then and there well know.

That under the provision of law applicable thereto the said bank commissioner was required by law to notify any bank, whose legal

money reserve should be below the amount required to be kept on hand, and if the bank should fail to repair the same for a period of thirty days after such notice under the law such bank was to be deemed insolvent, and it was the duty of such bank commissioner to take possession of the same and proceed to liquidate the same as provided by law for the liquidation of insolvent banks; that though the said bank commissioner frequently made demands upon said bank to repair its said reserve, that the said reserve was never repaired in fact and that said bank repeatedly and habitually failed to repair the same within thirty days as the said bank commissioner well knew and had reasonable cause to believe, and ample opportunity to discover, and it thereupon became the duty of the said bank commissioner to take possession of said bank before the time that said certificate was issued and at all the times thereafter until the time that he took possession of the same in February, 1915, but this duty was by him, in violation of his said bond, without just excuse, continuously postponed and delayed until the month of February, 1915 when the assets of said bank were so squandered and depleted as to be insufficient to pay the claim of the plaintiff.

Under the law of the state of Oklahoma applicable thereto it was provided that the total liabilities to any bank of any person
27 corporation, or firm, for money borrowed, including in the liabilitie- of such company or firm the liabilities of the several stockholders officers, or members thereof, should not at any time exceed twenty per cent of the capital stock of such bank, that the capital stock of the said Farmers & Merchants Bank was the sum of $10,000 but as the said bank commissioner well knew, the officers and persons in control of said bank before the making of the said certificate, and thence continuously until a short time before the bank commissioner took possession of the same, loaned from its funds more than twenty per cent of the capital stock of said bank; that these violations of law were habitual and continuous as the said bank commissioner well knew, and thereupon it became the duty of the said bank commissioner to take possession of the said bank and liquidate the same as insolvent, and that without justifiable cause or excuse in violation of his duty as bank commissioner, and in violation of his said bond, he postponed and delayed taking possession of said bank until the — day of February, 1915, and until the assets of said bank were so squandered and depleted as to leave insufficient to pay the claim of said plaintiff.

That before the time that said certificate was issued, the said Farmers & Merchants Bank was insolvent; that the market value of its assets were insufficient to pay it- liabilities, that it was unable to meet the demands of its creditors in the usual and customary manner and that it was unable to make good its reserve as required by law, and that each of these things were to the said bank commissioner well known or he had ample and full opportunity to learn the same, and that it was his duty before the making of said certificate to have taken possession of said bank for insolvency. That because of such excessive loans, such habitual overdrafts, such failure to keep the reserve required by law, and such inefficient

management and such insolvency of said bank as aforesaid, the capital stock of said bank became impaired as the said J. D. Lankford bank commissioner, well knew, and it the-eupon became the duty of said bank commissioner to cause the same to be repaired or to take possession of said bank at once, and that neither of
28 said things were done by said bank commissioner, and the said bank was allowed to continue in the wasting of its said assets until insufficient remained to repay plaintiff, and thereby damaging the plaintiff in said sum.

That finally in the month of February, 1915, the said bank commissioner took possession of said bank because of its insolvency and proceeded to take possession of all of its assets and to wind up its affairs as a bank, to collect its dues and to pay its debts and thereupon in due course the claim of the said plaintiff under said certificate was presented to said bank commissioner and without justifiable excuse by him, disallowed, and payment thereof refused in violation of law and in violation of the aforesaid bonds made by him, said J. D. Lankford, by them, the said Southwestern Surety Insurance Company as surety for him; and that said refusal was wrongfully, willfully and oppressively made and was an abuse of the discretion vested in him as bank commissioner in that there was no cause whatever to question the validity of said claim, but on the contrary all of the facts which he the said Lankford had before him in regard thereto showed the same to be a valid and legal claim a against the depositors' guaranty fund of the state of Oklahoma.

That the law of the state of Oklahoma requires that when a bank under its laws becomes insolvent, that the bank commissioner shall take possession of same, and pay its depositors in full, and when the cash available in said bank, or that can be made immediately available for that purpose is not sufficient to discharge its obligations to its depositors, it is provided by law that the banking board of the state of Oklahoma shall draw from the depositors' guaranty fund and place subject to the use of the bank commissioner the amount necessary to make up the deficiency and that the state of Oklahoma shall have for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank, and all liabilities against the stockholders, officers, or directors of said bank and against all other persons, corporations, or firms for the advance so made from the said depositors' guaranty fund, and that all such liabilities shall be enforced by the state for the benefit of said
29 depositors' guaranty fund and that by reason of said provision of law after the said J. D. Lankford, bank commissioner, took possession of said bank, the state of Oklahoma, thereby acquired a first lien upon all the assets of the said bank to recoupe the advanced amount necessary to be made from said depositors' guaranty fund, and that under the said law it is the duty of the said bank commissioner to pay the amount owing on the certificate to the said plaintiff, and to recoupe the same out of the assets of said bank under the said provisions of law as aforesaid.

That the enforcement of the said laws of the State of Oklahoma, in the matters herein complained of were and are solely through and

by said defendant, J. D. Lankford as Bank Commissioner and the same have been in this case interpreted and enforced by him in such wise as to deny this plaintiff the equal protection of the laws in violation of the 14th amendment to the constitution of the United States in this,—that said Bank Commissioner arbitrarily, capriciously and without legal justification has interpreted and enforced said laws as investing him with the arbitrary power to determine what deposits should be paid out of said available assets of said failed bank and what out of said depositors' guaranty fund and to make this determination unequally and not under the equal protection of the law in that he has determined as aforesaid that no payment or payments shall be made out of the available assets of said bank, in his possession to plaintiff or out of the said depositors' guaranty fund in satisfaction of said certificate of plaintiff, but that other and different depositors of said failed bank with no greater or different rights, whose claims and the amounts of whose deposits are unknow to the plaintiff but known to the said defendant Bank Commissioner, but of the same class and legal condition and situation as the deposit of this plaintiff, were and have been paid by him both out of the available cash resources of such failed bank and out of said depositors' guaranty fund, and for this, said law as thus enforced affords the plaintiff no remedy for correction of said determination by judicial review and thereby gives to said other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage.

Further said bank commissioner having arbitrarily and capriciously and without justification therefor, illegally determined what deposits shall be paid out of the available cash assets of said failed bank, and for what deposits advancements shall be made from the depositors' guaranty fund, does and did also to plaintiff's damage likewise capriciously and arbitrarily interpret and enforce said laws—so that he, said defendant Bank Commissioner, determined for himself for what amount he shall and should and does hold the assets of said failed bank and does and did impress upon the assets of said failed bank said first lien for recoupement to the State of Oklahoma, ahead of and superior to the lien of plaintiff thereon, in so large a sum that said assets are insufficient to pay the same or to leave anything to repay plaintiff for his said debt. And because the state of Oklahoma is immune from suit by plaintiff he has no remedy by judicial review to correct such illegal determination by defendant bank commissioner, either of the superiority of any of said other preferred creditors or of the whole or aggregate amount thereof as represented in said preferred liens to the state, ahead of plaintiff's liens thereby he, said defendant J. D. Lankford acting for said state as bank commissioner, deprives and deprived plaintiff of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States, by illegally disallowing plaintiff's claim and illegally allowing said other illegally preferred depositors and giving them and the state of Okahoma in lieu of them, said first lien aforesaid, and in all these matters thereby

breaching the said obligation in said bonds, Exhibits A and B aforesaid.

Therefore by failure to perform the promises made for the benefit of this plaintiff in the said bonds, Exhibits A and B the said plaintiff has been by the defendants, damaged in the sum of $5,300.00 on the 20th of February, 1915, together with six per cent interest thereon, until the same shall be paid, amounting on the 20th day of August, 1915, to the sum of $—.

31 Plaintiff was entirely without knowledge, notice, or information of any of the matters or things above stated, until thirty days before the said commissioner took possession of said bank when the condition of said bank was so entirely insolvent as to entirely incapacitate it from ability to repay said certificate except such as appeared upon the face of said certificate when he received the same, and the fact that he knew of the existence of a bank commissioner, charged in general with the duties and powers aforesaid and because of this knowledge and because of this lack of knowledge relying upon the full performance by the defendant, bank commissioner, of his duties, the plaintiff without fault on his part, allowed the moneys represented by said certificate to remain in said bank after the same became due, and upon said certificate nothing has ever been paid or allowed by way either of principal or interest.

Wherefore plaintiff prays that he may have his stockholders' liability aforesaid of $2,000.00 offset against the sums due him herein and that he may recover of and from the defendant over and above the said offset the sum of six hundred and sixty nine and 25/100 dollars ($6669.25) and interest thereon at six per cent until since Aug. 20th 1915 and for his costs herein and such further relief as the equity of the case may warrant.

LAWRENCE MARTIN, *Plaintiff,*
By WEST, HULL AND HAGAN,
His Attorneys.

32 EXHIBIT A.

Official Bond.

Southwestern Surety Insurance Company.

General Offices, Durant, Oklahoma.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Know all men by these presents: That we, J. D. Lankford, as Principal, and the Southwestern Surety Insurance Company, (a corporation) of Durant, Oklahoma, as Sureties, are held and firmly bound unto the State of Oklahoma, in the penal sum of Twenty Five Thousand Dollars for the payment of which we bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is: That, *whee* whereas the above bounden J. D. Lankford has been appointed Bank Commissioner in and for the State of Oklahoma,

Now, if the said J. D. Lankford shall render a true account of his office and of the doings therein to the proper authority, when required thereby or by law; and shall promptly pay over to the person or officers entitled thereto all money which may come into his hands by virtue of his said office; and shall faithfully account for all the balances of money remaining in his hands at the termination of his office; and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, and sureties, or other property appertaining to his said office, and deliver them to his successor, or to any person authorized to receive the same, and if he shall faithfully and impartially, without fear, favor, fr-ud or oppression, discharge all other duties now or hereafter required of his office by law, then this bond to be void; otherwise in full force.

Signed this 1st day of March, A. D. 1911.

SOUTHWESTERN SURETY INSURANCE COMPANY,
By H. W. PENTECOST, *Assistant Secretary.*

Approved March 8th, 1911.
LEE CRUCE, *Governor.*

33

EXHIBIT B.

Official Bond.

Southwestern Surety Insurance Company.

General Offices, Durant, Oklahoma.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Know all men by these presents: That we, J. D. Lankford, as principal, and The Southwestern Surety Insurance Company, a corporation of the State of Oklahoma, as Sureties are held and firmly bound unto the State of Oklahoma in the penal sum of Twenty Five Thousand ($25,000) Dollars for the payment of which we bind ourselves, our heirs, executors and administrators.

The Condition of the above obligation is: That whereas, the above bounden J. D. Lankford has been appointed Bank Commissioner in and for the State of Oklahoma,

Now, if the said J. D. Lankford shall render a true account of his office and of the doings therein to the proper authority, when required thereby or by law; and shall promptly pay over to the person or officers entitled thereto all moneys which may come into his hands by virtue of his said office; and shall faithfully account for

all the balances of money remaining in his hands at the termination of his office; and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers and sureties, or other property appertaining to his said office, and deliver them to his successor, or to any person authorized to receive the same, and if he shall faithfully and impartially, without fear, favor fraud, or oppression, discharge all other duties now or hereafter required of his office by law, then this bond to be void; otherwise in full force.

Signed this 19th day of March, A. D. 1915.

J. D. LANKFORD, *Principal;*
SOUTHWESTERN SURETY INSURANCE COMPANY,
By H. W. PENTECOST, *Attorney in Fact, Sureties.*

Approved April 18th, 1915.
R. L. WILLIAMS,
The Governor of the State of Oklahoma.

Exhibit B.

34 EXHIBIT C.

$2,500.00.

MOUNTAIN VIEW, OKLA., June 10, 1913. No. 673.

This certifies that Lawrence Martin has deposited with Farmers & Merchants Bank Twenty Five Hundred 0/100 Dollars, payable to the order of himself in seven months from date, on the return of this Certificate properly endorsed, with 4% interest.

L. C. WEST,
President-Cashier.

Certificate of deposit. Not subject to check.

Endorsed: Lawrence Martin.

EXHIBIT D.

$5,000.00. MOUNTAIN VIEW, OKLA., Aug. 21, 1913.

On the first day of November, 1913, without grace, I, we, or either of us, promise to pay to the order of Lawrence Martin, Five Thousand no/100 Dollars value received, payable at Farmers and Merchants Bank, Mountain View, Oklahoma, with interest from date at the rate of 7 per cent per annum.

In case this note is placed in the hands of an attorney for collection, or suit is brought hereon, we agree to pay an additional twenty five dollars and ten per cent of the amount due for attorney's fee. The makers, sureties, endorsers, guarantor and assignors severally waive protest, and notice of protest and demand. At maturity this

note may without notice, be extended for an additional time of the same length as the original time for which this note is made.

FARMERS & MERCHANTS BANK,
Mountain View, Okla.,
By L. C. WEST, *Pres't.*

Endorsed: Lawrence Martin.

Petition Endorsed: No. 1513. Lawrence Martin vs. J. D. Lankford, et al. Petition. Filed Sept. 14, 1915. Arnold C. Dolde, Clerk.

35 In the District Court of the United States for the Western District of Oklahoma.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Motion.

Comes now the State of Oklahoma, upon the relation of S. P. Freeling, Attorney General of said State, and after leave first had and obtained, appearing specially for the purposes of this motion and for no other purpose, says that it is a necessary party in interest to a proper determination of the issues described in plaintiff's petition, for that a judgment against defendants herein is in effect a judgment against the State of Oklahoma; that the State of Oklahoma does not consent to be sued in this cause, and objects to this action being maintained against it.

Wherefore, The State of Oklahoma moves the Court to dismiss this action for want of jurisdiction over the party defendant.

S. P. FREELING,
Attorney General.
JNO. B. HARRISON,
Assistant Attorney General.

#1513. Copy. Motion.

36 Endorsed: No. 1513. In the District Court of the United States for the Western District of Oklahoma. Lawrence Martin, Plaintiff, vs. J. D. Lankford, and Southwestern Surety Company, a corporation, Defendants. Motion. Filed Oct. 7, 1915. Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

37 In the District Court of the United States for the Western District of the State of Oklahoma.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Motion to Amend.

Comes now the plaintiff and asks the court for leave to amend his petition by the insertion of the following words at the end of each separate cause of action:

Plaintiff says that the enforcement of said law by the State of Oklahoma through the administration thereof by J. D. Lankford, defendant, as bank commissioner, abridges the privileges and immunities of himself as a citizen of the United States in this, to-wit: That the said bank commissioner has allowed and paid out of the assets of said failed bank and out of the said guaranty fund the deposits of various persons similarly situated with himself, but as aforesaid denies and refuses arbitrarily and without just excuse to allow or pay the deposit of the plaintiff set out in this cause of action and because of the laying on of the lien on the assets of said failed bank by the State of Oklahoma for all sums by it advanced to the payment of said depositors as aforesaid, thereby postpones and prevents the collection by the plaintiff from the said failed bank of the amount due him in this cause of action because the amount advanced by said State is greater than the amount of the value of the assets of said failed bank and as a citizen of the United States, the plaintiff is and was entitled to the same treatment, enforcement and administration of the law by the State of Oklahoma as to the payment and allowance of his deposit as is by the State of Oklahoma,
38 enforced, accorded, allowed and paid to the said other depositors whose claims were by the state allowed through the administration of said defendant, J. D. Lankford, and whose situation was in all respects similar to that of the plaintiff in regard to his deposit.

CHAS. WEST AND
H. H. HAGAN,
Attorneys for Plaintiff.

Endorsed: Filed Dec. 31, 1915. Arnold C. Dolde, Clerk. By Frank T. McCoy, Deputy.

39 In the District Court of the United States for the Western District of the State of Oklahoma.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Journal Entry.

On this the 1st day of January, 1916, the same being one of the regular judicial days of the Special December term of this court, the plaintiff being present by Chas. West, his attorney, and the defendants by J. I. Howard, Assistant Attorney General, the motion of the defendants to Dismiss the Action as one against the State of Oklahoma without its consent in violation of the Eleventh Amendment to the Constitution of the United States comes on to be heard, and pending the decision of said motion, the plaintiff is allowed according to his request on file to amend his petition by the addition of the amendment already on file, and now the court being duly advised as to said motion of the defendants, sustains said motion to dismiss said action, to which the plaintiff at the time duly excepts. And thereupon the court doth hereby dismiss this action at the costs of plaintiff, to which the plaintiff excepts at the time, and thereupon in open court the plaintiff notifies defendants of his intention to apply to this court for a writ of error in this action to the Supreme Court of the United States, the question of jurisdiction alone being involved in the said decision just rendered.

JOHN H. COTTERAL,
District Judge.

O. K.
WEST,
O. K.
J. I. HOWARD,
Att'y for Def.

Endorsed: Filed Jan. 1, 1916. Arnold C. Dolde, Clerk. By M. V. Haws, Deputy.

40 In the District Court of the United States for the Western District of the State of Oklahoma.

No. 1513.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Petition for Allowance of Writ of Error Directed to the Supreme Court of the United States on the Question of Jurisdiction.

The plaintiff, Lawrence Martin, respectfully represents that there is manifest error committed to his injury by the judgment pronounced in this case on the 1st day of January, 1916, in and by which final judgment this court refused jurisdiction of the cause set forth in the plaintiff's petition on the ground that this was in effect a suit against the State of Oklahoma of which this court had no jurisdiction by reason of the provisions of the Eleventh Amendment to the Constitution of the United States and on said ground, the court on said January 1, 1916, entered a final judgment dismissing this cause for want of jurisdiction. A prayer for the reversal of said judgment is hereto attached to be transmitted to said appellate court.

Wherefore, plaintiff, Lawrence Martin, considering himself aggrieved, prays an order granting a writ of error from said final judgment denying jurisdiction as aforesaid to the Supreme Court of the United States as authorized by Section 238, of the Act of Congress of the United States, approved March 3, 1911; and plaintiff refers to his assignment of errors now on file in which he separately and particularly sets out each error asserted and intended to be urged and the plaintiff prays this honorable court to allow said writ of error

41 and that a transcript of so much of the record, proceedings and papers upon which said judgment was made as may be necessary to present said question of jurisdiction on appeal duly authenticated may be sent to the Supreme Court of the United States. The plaintiff hereafter files and offers its bond in the penal sum of Three Hundred Dollars ($300.00) for said writ of error and asks that same be approved and the writ of error be allowed.

CHAS. WEST,
H. H. HAGAN,
Attorneys for Plaintiff.

Endorsed: No. 1513. Lawrence Martin, vs. J. D. Lankford, et al. Petition for allowance of Writ of Error. Filed Jan. 10, 1916. Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

42 To the Honorable the Supreme Court of the United States:

No. —.

LAWRENCE MARTIN, Plaintiff in Error,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendant in Error.

Now comes Lawrence Martin the plaintiff in error and prays for a reversal of the judgment of the District Court of the United States for the Western District of the State of Oklahoma, in an action brought by plaintiff in error as plaintiff against the defendants in error as defendants, which judgment was entered in the office of the Clerk of said court on the 1st day of January, 1916.

CHAS. WEST,
Of Oklahoma City, Okla.,
Attorney for Plaintiff in Error, Lawrence Martin.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

43 In the District Court of the United States for the Western District of Oklahoma.

No. 1513.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Assignment of Errors.

Comes now the plaintiff, Lawrence Martin, by Charles West, and H. H. Hagan, his attorneys, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The District court of the United States for the Western District of Oklahoma, erred in holding and deciding that said court as a court of the United States had no jurisdiction to try and determine this action and in rendering this judgment dismissing the same for the want of such jurisdiction.

II.

That said court erred in holding and deciding that this was in effect an action against the state of Oklahoma without its consent

and in violation of the Eleventh Amendment to the Constitution of the United States.

III.

The court erred in holding and deciding that a personal action for damage done plaintiff by the defendant J. D. Lankford in failing to perform the official duties required of him by law as bank commissioner of the State of Oklahoma to be performed for
44 the benefit of plaintiff, and the consequent action based upon such failure and damage against said J. D. Lankford, and defendant Southwestern Surety Insurance Company as his surety, was in effect one against the State of Oklahoma.

IV.

The court erred in holding and deciding that a personal action for damage done plaintiff by defendant J. D. Lankford, in arbitrarily and without just cause disallowing his claim as a depositor in a failed bank in the State of Oklahoma, in allowing the claims of other depositors situated in all respects similarly to that of plaintiff, and in making such decision without evidence, without notice, without a hearing provided by law, without an opportunity afforded by law for judicial review of his action therein, and making said allowance and disallowance while he, himself, said J. D. Lankford, was acting as Receiver for said failed bank and in placing a first lien upon the assets of said failed bank for the amount of said allowances to the hindering and delaying of plaintiff in the collection of his claim out of the assets of said failed bank, thus depriving him of property without due process of law and depriving him of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and the consequent action based upon said facts against said J. D. Lankford and Southwestern Surety Insurance Company as his surety, was in effect one against the State of Oklahoma.

CHAS. WEST,
H. H. HAGAN,
Attorneys for Plaintiff.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

45 In the United States District Court for the Western District of Oklahoma.

No. 1513.

LAWRENCE MARTIN, Plaintiff,
vs.
J. L. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

The plaintiff's petition having been dismissed by judgment of this court on the sole ground that this court as a court of the United States had no jurisdiction of the cause and the plaintiff having prayed a writ of error to the Supreme Court of the United States on said question of jurisdiction, and that said question be certified to said Supreme Court of the United States, it is now ordered in open court that the said writ of error be allowed on the question only from the final order and decree dismissing said action for want of jurisdiction and is further ordered that so much of the record proceedings and papers upon which said judgment was made as are necessary to present this question of jurisdiction and no more be included in the record on appeal.

JOHN H. COTTERAL,
Judge District Court of the United States for the Western District of Oklahoma.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

46 Know all men by these presents, That we, Lawrence Martin and W. K. Patterson, are held and firmly bound unto J. D. Lankford and Southwestern Surety Insurance Company, in the full and just sum of Three Hundred & no/100 ($300.00) Dollars to be paid to the said J. D. Lankford and Southwestern Surety Insurance Company, heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this 10th day of January, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at the December term of the District Court of the United States for the Western District of Oklahoma in a suit depending in said Court between Lawrence Martin, plaintiff, and J. D. Lankford and Southwestern Surety Insurance Company, defendant, a judgment was rendered against the said Lawrence Martin, and the said Lawrence Martin has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. D. Lankford and Southwestern Surety Insurance Company, citing and admonishing them to be and appear in the

Supreme Court of the United States, at the City of Washington, D. C., sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Lawrence Martin shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

LAWRENCE MARTIN. [SEAL.]
W. K. PATTERSON. [SEAL.]

Approved by
JOHN H. COTTERAL,
Judge United States District Court,
Western District of Oklahoma.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

47 In the District Court of the United States for the Western District of Oklahoma.

LAWRENCE MARTIN, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Præcipe for Transcript of Record.

To the Clerk of the United States District — for the Western District of Oklahoma:

You will please incorporate into the transcript of the record on the Writ of Error of the above case to the Supreme Court of the United States, the following portions of the record:

The Citation to be issued herein requiring defendants to appear in the Supreme Court of the United States on this Writ of Error and proof of service thereof.

The Original petition.

The Motion of defendants to Dismiss the petition.

The application of the plaintiff to amend his petition.

The order of the court sustaining the application to amend and sustaining the motion to dismiss and dismissing the petition.

The petition for Writ of Error.

The order of the court allowing such Writ of Error.

The Prayer for reversal.

The undertaking on appeal.

The assignment of errors.

This præcipe for transcript of record.

CHAS. WEST,
Attorney for Plaintiff.

Received a copy and acknowledge service of the above Præcipe this the 10 day of January, 1916.

S. P. FREELING,
Att'y General,
By J. I. HOWARD,
Ass't Attorney General of the State of Oklahoma,
Attorney for Defendants.

The above præcipe is satisfactory to me.
Dated January 10, 1916.

S. P. FREELING,
Att'y General,
By J. I. HOWARD,
Ass't Att'y Gen.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

48 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 1513, wherein Lawrence Martin, is plaintiff and J. D. Lankford and Southwestern Surety Insurance Company, a corporation, are defendants, as full, true and complete as the said transcript purports to contain, and as called for by the præcipe for transcript of the record above set forth.

I further certify that the original citation and the original writ of error are hereto attached and are herewith returned with the transcript of the record in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Guthrie, in said Western District of Oklahoma, this 25th day of January, A. D. 1916.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States
for the Western District of Oklahoma,
By M. V. HAWS, *Deputy.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/25/16. A. C. D., M. V. H.]

Endorsed on cover: File No. 25,116. W. Oklahoma D. C. U. S. Term No. 833. Lawrence Martin, plaintiff in error, vs. J. D. Lankford and Southwestern Surety Insurance Company. Filed January 29th, 1916. File No. 25,116.

SUPREME COURT OF THE UNITED STATES

EDWARD F. JOHNSON Plaintiff-in-Error *against* J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY Defendants-in-Error	OCTOBER TERM 1915 No. 832
LAWRENCE MARTIN Plaintiff-in-Error *against* J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY Defendants-in-Error	OCTOBER TERM 1915 No. 833

SIRS:

PLEASE TAKE NOTICE that a motion will be made at a session of this Court to be held on the_____day of _____, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance these causes on the docket of this Court.

Dated,_____

_____

To

S. P. FREELING, Esq.,
Attorney General of Oklahoma;

J. I. HOWARD, Esq.,
Assistant Attorney General of Oklahoma,

Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES

EDWARD F. JOHNSON Plaintiff-in-Error *against* J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY Defendants-in-Error	OCTOBER TERM 1915 No. 832
LAWRENCE MARTIN Plaintiff-in-Error *against* J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY Defendants-in-Error	OCTOBER TERM No. 893

NOW COME Edward F. Johnson, plaintiff-in-error, and Lawrence Martin, plaintiff-in-error, and move this Court to advance these causes on the docket of this Court.

STATEMENT

THE QUESTION

The question at issue in these cases is whether banking with a domestic corporation in the State of Oklahoma is "a question of state," (in the sense understood on the continent).

The question is whether injurious breaches of the state banking laws by state officers acting under color of state power, which breaches are also violations of the federal constitutional guarantees of the privileges and immunities of citizenship (Sec. 2, Art. IV.), of equal protection of equal laws, and of property as against deprivation except by due process (Sec. 1, 14th Amndmt.) may give rise to actions under Revised Statutes of United

States Compiled 1913, Sec. 3932 (Myers vs. Anderson, 238 U. S. 368).

HOW ARISING

These cases are the sequelæ of the Lankford vs. Platte Iron Works, 235 U. S. 461, series of decisions.

They come to this court on writs of error from the United States District Court for the Western District of Oklahoma on certificate of a jurisdictional question, the lower court having upheld the contention of defendants in error that jurisdiction was forbidden by the 11th Amendment, and dismissed the actions. The two cases were argued together and involve closely similar points, identical as to the applicability of the 11th Amendment vel non.

CONTENTIONS OF EACH SIDE

The defendants in error contend that the cases fall within the ruling of the Lankford cases supra, and are but an indirect attack upon the State of Oklahoma.

The plaintiffs in error on the contrary, that the immunity granted the state does not extend to damage done by its officers though acting under color of her authority, if illegally done.

Belknap et al., vs. Schild, 161 U. S. 10.
Hopkins vs. Clemson Agri. Col., 221 U. S. 636.

Unlike Lankford vs. Platte Iron Works, no judgment is sought against the state's funds, or funds under its control, but only one against an individual who perpetrated this injury under the guise of state power. The state is not interested.

Reagan vs. Farmers Trust Co., 154 U. S. 263, p. 390.

REASONS FOR ADVANCEMENT

I.

IMPORTANCE TO PUBLIC

The State of Oklahoma has established an exclusive banking system for its domestic banks. Under it the state has a first lien on the assets of all failed state banks as reimbursement for advances made to pay depositors. All the thousands of persons dealing with these banks are vitally interested as a substantial matter of business in knowing whether or not a state bank commissioner, having arbitrarily refused to pay a depositor of a failed state bank, and having debarred such depositor of any relief out of the assets of the bank by applying the state's first lien thereon, may further deprive such refused depositor of any relief whatsoever by being granted immunity from suits seeking damage from him personally for his arbitrary and illegal acts. In short, whether the banking laws of the state as applied to him is a government of laws or men.

II.

OTHER CASES PENDING

Because other similar cases await the outcome of these.

III.

PRINCIPLE OF FORMER APPEAL PARTLY APPLICABLE

While these cases are no part of the litigation decided in Lankford vs. Platte Iron Works, yet these pick up the quarrel where those left off, and thus the principle of advancing cases once already before the court applies in part. These are but attempts at relief against individuals, the state's agents, for the same genus of wrongs therein sought to be relieved against the state itself.

AVERMENTS OF COMPLAINTS DIGESTED.

Jurisdiction of the case of Johnson rested on diversity of citizenship as well as the federal statutory and constitutional questions involved.

E. F. Johnson, a citizen of Massachusetts, a depositor in an Oklahoma domestic bank, under the supervision of the bank commissioner, lost his deposit because the bank commissioner took possession of the assets of the failed bank as a receiver and proceeded, though thus himself interested, to determine without notice, hearing, evidence, or opportunity for judicial review of his determination, to allow and disallow depositors' claims, and after allowing and paying claims of many depositors, citizens of Oklahoma, otherwise situated similar to Johnson, whose claim he arbitrarily and without legal justification disallowed, proceeded to impress the assets of the failed bank, with a first lien for amount he had allowed and paid.

This discrimination between Johnson and the Oklahoma citizens whose deposits were allowed was an infringement of Johnson's privileges and immunities as a citizen of Massachusetts against Sec. 2 of Art. IV. of the Constitution:

Blake vs. McClung, 172 U. S. 339.

Even though the law was fair on its face, this administration was forbidden.

Yick Wo vs. Hopkins, 118 U. S. 356.

And being a state officer in possession of state power using the power to invade the constitution, it was state action.

Home T. & T. Co. vs. Los Angeles, 227 U. S. 278.

It also deprived Johnson of his property without due process:

Because it entirely exhausted the debtor's assets everywhere, and the proceedings to determine the lien therefor were by the bank commissioner though a receiver (Ward vs. Okla. St. Bk., 151 Pac. 852; Frisco vs. Hamer et al., 150 Pac. 1101) acting as judge in his own case (People of N. Y. vs. O'Brien, 111 N. Y. 1, 18 N. E. 682);

Because there was no notice or hearing provided by law:

Coe vs. Armour Fert. Wks., 237 U. S. 413.

Because there were no judicial proceedings to determine the lien, or opportunity for judicial review of the determination made.

Parsons vs. Russell, 11 Mich. 113.

Williams vs. Wedding et al. (Ky.), 176 S. W. 1176.

Matter of Empire State Bank, 18 N. Y. 199.

Further there were allegations of neglect of supervision over the bank and its officers (State ex rel. vs. Am. Sur. Co., 145 Pac. 1098; Same vs. Title & Sur. Co., 152 Pac. 189), which because of defendant's illegal disposition of the remaining assets entirely destroyed plaintiff's property.

Martin's case was like Johnson's except that as a citizen of Oklahoma, within its jurisdiction, the discrimination in disallowing his deposits and allowing those of others situated as was he, constituted a denial of the equal protection of the law in violation of Sec. 1 of the 14th Amendment.

Blake vs. McClung, supra.

CHAS. WEST,
Attorney for Plaintiffs-in-Error

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 396

EDWARD F. JOHNSON,
Plaintiff-in-Error

vs.

J. D. LANKFORD and
SOUTHWESTERN SURETY INSURANCE CO.
Defendants-in-Error

and

No. 397

LAWRENCE MARTIN,
Plaintiff-in-Error

vs.

J. D. LANKFORD and
SOUTHWESTERN SURETY INSURANCE CO.
Defendants-in-Error

In Error to the District Court of the United States for the Western District of Oklahoma.

BRIEF FOR PLAINTIFFS IN ERROR.

CHAS. WEST, Oklahoma City,
Attorney for Plaintiff-in-Error

S. P. FREELING and
J. I. HOWARD, Oklahoma City,
Attorneys for Defendants-in-Error

SUBJECT INDEX.

Supreme Court of the United States

EDWARD F. JOHNSON Plaintiff-in-Error vs. J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY Defendants-in-Error	OCTOBER TERM 1916 No. 368
LAWRENCE MARTIN Plaintiff-in-Error vs. J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY Defendants-in-Error	OCTOBER TERM 1916 No. 369

ABSTRACT.

QUESTION INVOLVED.

The two cases are briefed together as presenting substantially the same question, which is this:

Each of these is a suit against the person who happens to be the Bank Commissioner of Oklahoma, joining the surety on his official bond for damages because of official acts of commission and omission, to the pecuniary injury of the property of plaintiff—is this a suit against the State of Oklahoma? (For abstract of allegations of petition, see *infra* following assignments of error.)

The defendants in error contend that the cases fall within the rule of: *Lankford* v. *Platte Iron Works*, 235 U. S. 461, and that series of cases.

The plaintiffs in error, on the contrary, insist that unlike those cases, in these, no judgment is sought against the state's funds, or funds under the management of the state, but only such a judgment as goes against an individual who, under the guise of state power, it is true, perpetrated injury. This is a critical difference.

Reagan v. *Farmers' Trust Co.*, 154 U. S. 263, p. 390.

Oklahoma is here less interested than was the United States in:

Belknap et al. v. *Schild*, 161 U. S. 10.

Or South Carolina in:

Hopkins v. *Clemson Agri. Col.*, 221 U. S. 636.

In that portion of each case which is bottomed on violation of state law, the cases apparently are on all fours with:

Title Guaranty Co. v. *Idaho ex rel.*, 240 U. S. 136.

MANNER IN WHICH QUESTIONS AROSE.

To the petitions, motions to dismiss were filed, different in wording, but alike in substance, resting, fundamentally, upon the Eleventh Amendment to the Federal Constitution.

In No. 368, the Johnson case, the grounds were, in short (p. 12, Record):

That the court was without jurisdiction of the defendant because, it was claimed:

1. The acts alleged were as of defendant as bank commissioner.

2. As such the court had no jurisdiction over him. But the action was against the State of Oklahoma.

3. The defendants have no personal interest in the subject-matter of the suit.

In No. 369, the Martin case, the ground was more simply, but similarly stated, to be:

Because the state is a necessary party, and it cannot be sued without its consent.

These motions were both sustained (No. 368, p. 15, No. 369, p. 27).

Writs of error were prayed and allowed, and the trial court certified that the decision went solely upon the question of jurisdiction (No. 368, p. 19; No. 369, p. 31).

(For an abstract of the allegations of the petitions, see the pages following "assignments of error.")

ASSIGNMENTS OF ERROR.

These were identical in the two cases (No. 832, pp. 17-18; No. 833, pp. 29-30), as follows:

I.

The District Court of the United States for the Western District of Oklahoma erred in holding and deciding that said court as a court of the United States had no jurisdiction to try and determine this action and in rendering its judgment dismissing the same for the want of such jurisdiction.

II

That said court erred in holding and deciding that this was in effect an action against the State of Okla-

homa without its consent and in violation of the Eleventh Amendment to the Constitution of the United States.

III.

The court erred in holding and deciding that a personal action for damage done plaintiff by J. D. Lankford in failing to perform the official duties required of him by law as bank commissioner of the State of Oklahoma, to be performed for the benefit of plaintiff and the consequent action based upon such failure and damage against said J. D. Lankford, and defendant Southwestern Surety Insurance Company as his surety, was in effect one against the State of Oklahoma.

IV.

The court erred in holding and deciding that a personal action for damage done plaintiff by defendant, J. D. Lankford, in arbitrarily and without just cause disallowing his claim as a depositor in a failed bank in the State of Oklahoma, and in allowing the claims of other depositors situated in all respects similarly to that of plaintiff, and in making such decision without evidence, without notice, without a hearing provided by law, without an opportunity afforded by law for judicial review of his action therein, and making said allowance and disallowance while he, himself, said J. D. Lankford, was acting as Receiver for said failed bank and in placing a first lien upon the assets of said failed bank for the amount of said allowances to the hindering and delaying of plaintiff in the collection of his claim out of the assets of said failed bank, thus depriving him of property without due process of law and depriving him of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and the consequent action based upon said facts against said J. D. Lankford and Southwestern Surety Insurance Com-

pany as his surety, was in effect one against the State of Oklahoma.

ALLEGATIONS OF PETITIONS.

Lawrence Martin, the plaintiff in No. 369, now a citizen of Oklahoma, deposited funds in a state bank in Oklahoma. Later he deposited additional funds there, but caused these latter to be accredited to Edward F. Johnson, a citizen of Massachusetts, and the plaintiff in the other suit. The certificate of deposit for the latter was made out to the plaintiff in No. 368.

Both Johnson and Martin lost their deposits, because from the time they were made the defendant bank commissioner entirely failed to exercise proper supervision over the bank, as directed by the statute; with gross negligence allowed the persons in charge of it to squander its assets; allowed it to continue to conduct its business while and after its reserve was greatly less than required by law, and failed after knowledge of the facts, to take possession of the bank or do anything else adequate to enforce this law; allowed the persons in charge continuously and repeatedly to make excessive loans, that is, loans greater than the limit specifically fixed by law; allowed the persons in charge continuously and repeatedly to allow excessive overdrafts; allowed these persons to remain in charge of the bank when he the bank commissioner knew they were incompetent; and all of these when he had the knowledge, the power, the means, and the duty of acting precisely to the contrary, and when it was the duty of him, under the statutes, promptly to discover, and on discovery of them, to take charge of the bank for the protection of its depositors and stockholders for each and all of these

reasons, and not allow the bank to continue its ruinous course, as in fact, he did.

The extent of injury thus caused is in each case above $5,000, and in the Johnson case, resting as it does, for jurisdiction upon diversity of citizenship as well as violations of Federal rights, there can be no question of jurisdiction if the action is held not to violate the Eleventh Amendment.

For a ready grasp of the Federal question, necessary to a final determination of the Martin case, and a proper, though not necessary part of the Johnson case, a slight digression, by way of summary of the peculiar provisions of the Oklahoma bank law, is deemed helpful.

Then let us say:

The State of Oklahoma has established an exclusive banking system for its domestic banks (*Noble State Bank* v. *Haskell*, 219 U. S. 575).

Under it the state gathers assessments from the constituent banks into a state guaranty fund. The state for the benefit of the fund has a first lien on the assets of all failed state banks, as reimbursement for advances made out of the fund, to pay depositors of failed state banks. This fund and the management of it by the state bank commissioner are exempt from judicial compulsion as a state governmental activity (*Lankford* v. *Platte Iron Works*, 235 U. S. 461, and cognate decisions.)

Under the statute, the state bank commissioner not only determines ministerially, (1) the above question of who shall be paid from the bank guaranty fund (a non-judicial questions) but (2) takes possession of the failed bank as a receiver (*Ward* v. *Oklahoma State Bank*, 151 Pac. 852; *Briscoe* v. *Hamer et al.*, 150 Pac. 1101), and determines, without notice, hearing, or opportunity for judicial review, what shall be the extent of recoupment

of the fund cast upon the failed bank's assets as a first lien. This has, we contend, judicial consequences.

If he exhausts the assets of such failed bank, all recourse to creditors not paid out of the depositors' guaranty fund is gone.

In which contingency we contend he is subject to suit *personally* and on his official bond for:

(a) Neglect of supervision over the bank and its officers (*State ex rel.*, v. *American Surety Co.*, 145 Pac. 1098; *State ex rel.* v. *Title Surety Co.*, 152 Pac. 189, affirmed in this court *sub-nom.; Title Guaranty Co.* v. *Idaho ex rel Allen*, 240 U. S. 136).

Plaintiffs in error deny that the existence of the bank guaranty fund and its exemption from suit takes away this ancient remedy. The defendants in error contend to the contrary.

(b) If the state bank commissioner in making his determination of the extent of the first lien cast upon the failed bank's assets shall refuse to include one justly so entitled and therein shall (1) breach the state law, does the Eleventh Amendment to the Federal Constitution exempt him and his bond from liability in damages?

This the plaintiff denies, but the defendants affirm it.

And, (c), may the bank commissioner under his power of allowance against the guaranty fund and the placing of these allowances against the assets of the failed banks as a first lien (a) deprive a citizen of Massachusetts of the privileges and immunities of citizenship by disallowing his claim, solely because of his citizenship, when allowing like claims in the hands of citizens of Oklahoma, contrary to the provisions of Sec. 2, Art. 14, of the Constitution of the United States, and thus

deprive him of the equal protection of the laws, and of his property without due process of law, in violation of the first section of the Fourteenth Amendment?

In determining what shall be cast upon, and exhaust, the assets of a failed bank no notice or hearing is provided by law. *Coe* v. *Armour Fert. Wks.*, 237 U. S. 413. No opportunity for judicial review of this determination is afforded by law. *Parsons* v. *Russell*, 11 Mich. 113; *Williams* v. *Wedding et al.* (Ky.) 176 S. W. 1176; *Matter of Empire State Bk.*, 18 N. Y. 199. The bank commissioner as a receiver is also judge in his own case. *People* v. *O'Brien*, 111 N. Y. 1, 18 N. E. 682. This violated the first section of the fourteenth amendment to the constitution by taking property without due process.

The discrimination against the Massachusetts citizen Johnson, Martin's assignee, as compared with the Oklahoma citizens, similarly situated, was an infringement of the privileges and immunities of citizenship contrary to Sec. 2 of Art. 4 of the Federal Constitution. *Blake* v. *McClung*, 172 U. S. 239. Even though the law was fair on its face. *Yick Wo* v. *Hopkins*, 118 U. S. 356. Being a state officer in possession of state power, used to invade the constitution, it was state action. *Home T. & T. Co.* v. *Los Angeles*, 227 U. S. 278.

The discrimination against the Oklahoma citizen Martin, Johnson's assignor, as compared with all the other Oklahoma citizens, similarly situated, was a violation of the first section of the fourteenth amendment to the constitution as denying Martin the equal protection of the law.

The plaintiffs contend that these breaches of the Federal Constitution gave them a right of action in the lower court under Rev. Stat. of U. S. Comp. L. 1913, section 3932, in that they urge the defendant bank commissioner is "a person who under color of a statute * * * or reg-

ulation * * * of a state * * * subjects * * * * * * a citizen of the United States * * * to the deprivation of any rights, privileges or immunities secured by the constitution and laws," and he "shall be liable to the party injured in an action at law." *Myers* v. *Anderson,* 238 U. S. 368.

This the defendants in error deny.

To recur now to the allegations of the petitions: After alleging the continued and habitual neglect of the bank commissioner to prevent the loss or any part of it, the petitions aver that:

Finally, though with negligent dilatoriness, the bank commissioner as a receiver took charge of the bank for insolvency, and proceeded, without a hearing or notice, to determine, without opportunity of judicial review, the amounts to be paid depositors and to be cast on the funds of the banking corporation as a first lien.

That he without just excuse disallowed the claims of both plaintiffs as depositors, although allowing and paying and impressing a lien for recoupment thereof upon the bank's assets, the claims of other depositors who were citizens of Oklahoma, otherwise situated similarly to Johnson and Martin. That the impressment of these claims, so illegally determined and in breach of Johnson's privileges as a citizen of the United States, under the constitution, and in violation of Martin's rights under the Federal Constitution, to the equal protection of the law, was done by defendant bank commissioner under the guise of state power and thereby deprived the plaintiffs of their property without due process.

That the surety company in its bonds guaranteed the faithful performance by the bank commissioner of all his

duties, and this contract thus breached damaged each plaintiff in the amount prayed.

STATUTES INVOLVED.

STATE STATUTES.

AS TO RESERVE.

Sec. 267 provides:

"Every bank doing business under the laws of this state shall have on hand at all times in available funds the following sums, to-wit: Banks located in towns or cities having a population of less than 2,500 persons, an amount equal to 20 per cent of their entire deposits. (Mountain View, see census, had less than 2,500 persons.)

"Whenever the available funds in any bank shall be below the required amount, such bank shall not increase its liabilities by making any new loans or discounts otherwise than the discounting or purchasing bills of exchange, payable at sight, nor make any dividends of its profits until the required proportion between the aggregate amount of its deposits and its lawful money reserve has been restored; and the bank commissioner shall notify any bank whose lawful money reserve shall be below the amount required to be kept on hand to make good such reserve, and if such bank or association shall fail to do so for a period of thirty days after such notice, it shall be deemed to be insolvent, and the bank commissioner shall take possession of the same and proceed in the manner herein provided relating to insolvent banks."

AS TO REMOVAL OF INCOMPETENT OFFICIAL.

Sec. 263 provides:

"Any officer of a bank found by the bank commissioner to be dishonest, reckless or incompetent shall be removed from office by the board of directors

of the bank of which he is an officer, on the written order of the bank commissioner."

LIMIT ON LOANS.

Sec. 268 provides:

"The total liabilities to any bank of any person, corporation or firm, for money borrowed, including in the liabilities of such company or firm the liabilities of the several stockholders, officers or members thereof, shall not at any time exceed 20 per cent of the capital stock of such bank; but the discount of bills of exchange drawn in good faith against actual existing values, as collateral security and a discount of commercial or business paper, actually owned by the person, shall not be considered as money borrowed."

The capital stock of the Farmers & Merchants Bank of Mountain View was $10,000, therefore the limit of loans to any one person was $2,000.

AS TO OFFICERS BORROWING.

Sec. 270 provides:

"It shall be unlawful for any active managing officer of any bank organized or existing under the laws of this state to borrow, directly or indirectly, money from the bank with which he is connected; and the officer making or authorizing a loan to any such person, as well as the person receiving the same, shall be deemed guilty of a larceny of the amount borrowed."

COMMISSIONER'S MEANS OF INFORMATION.

Sec. 271 provides, in addition to requiring the four sworn reports each year and oftener, if called upon by the

bank commissioner, and according to the form which may be prescribed by him, also as follows:

"The bank commissioner shall also have power to call for special reports from any bank whenever, in his judgment, the same are necessary in order to gain a full and complete knowledge of its condition * * *."

WHEN BANK INSOLVENT.

Sec. 278 provides:

"A bank shall be deemed to be insolvent, first, when the actual cash market value of its assets is insufficient to pay its liabilities; second, when it is unable to meet the demands of its creditors in the usual and customary manner; third, when it shall fail to make good its reserve as required by law."

THEN COMMISSIONER SHALL TAKE POSSESSION.

Sec. 288 provides:

"Whenever it shall appear that the capital of any bank doing business under this chapter has become impaired, the bank commissioner shall notify such bank to make such impairment good within sixty days, and it shall be the duty of the officers and directors of any bank receiving such notice from the bank commissioner to immediately call a special meeting of its stockholders, for the purpose of levying an assessment upon its stockholders sufficient to cover the requirements of its capital stock * * *."

ALSO.

Sec. 302:

"Whenever any bank or trust company organized or existing under the laws of this state shall voluntarily place itself in the hands of the bank commis-

sioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this state shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

COMMISSIONER SHALL CAST LIEN ON PROPERTY.

Section 303:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Sec. 300, the amount necessary to make up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

COMMISSIONER'S BOND.

Sec. 334 provides:

"The bank commissioner shall, before entering upon the discharge of his duties, take and subscribe the usual oath of office, and execute to the State of Oklahoma a bond in the sum of $25,000, with sufficient surety, for the *faithful performance of his duty*, to be approved and filed as provided by law."

DUTY TO EXAMINE.

Sec. 337:

"It shall be the duty of the bank commissioner or one of his assistants to visit every bank or trust company subject to the provisions of this chapter at least twice each year, and oftener if he deem it advisable, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank or trust company, and for that purpose the bank commissioner and his assistants are hereby authorized and empowered to administer oaths and to examine under oath the stockholders and directors and all officers and employees and agents of such banks or other persons. The commissioner shall reduce the result thereof to writing, which shall contain a full, true and careful statement of the condition of such bank or trust company, and file and retain the same in his office."

CALL FOR REPORTS.

Sec. 340 gives the bank commissioner the power to call for reports at least four times a year, and as many more as he desires.

AUXILIARY PROVISIONS.

Sec. 2, chapter 27, Session Laws 1913, page 25, provides as to bonding of the bank commissioner exactly

the same words as the Statute of 1910.

Sec. 9, chapter 22, Session Laws 1913, page 32, reads:

> "No deposit in any state bank on which a greater rate of interest is allowed or paid either directly or indirectly, than is permitted by the rules of the bank commissioner, shall participate in the awards of the guaranty fund."

Four months certificates are allowed to draw 4 per cent, and less than four months, 3 per cent.

Session Laws 1915, chapter 58, relative to the reserve of banks, did not go into effect until the 3rd of March, 1915.

Right of plaintiffs to sue bond, Sec. 5349, Compl. Stat. 1910:

> "Action on Official Bond. When an officer, executor or administrator within this state, by misconduct or neglect of duty, forfeits his bond or renders his sureties liable, any person injured thereby, or who is, by law, entitled to the benefit of the security, may bring an action thereon in his own name, against the officer, executor or administrator and his sureties, to recover the amount to which he may be entitled by reason of the delinquency."

BRIEF.

The contention of the defendants in error in the lower court which was there upheld is that banking, the whole of it, is a state question—there are no private justiciable rights growing out of it. It is not necessary to consider how far if at all the defendants in error may be right in this conclusion. For it would sufficiently appear that Sec. 5349 of the Compiled Statutes of Oklahoma of 1910 specifically give the right to sue every negligent or derelict officer on his bond. The suit to be brought by the person injured. It would seem that this statute affords the very consent if any is needed from the state to bring this suit.

The words of the statute are cited on page 16 of this brief; it is sufficient to repeat here only as follows:

> "When an officer within this state, by misconduct or neglect of duty, renders his sureties liable, any person injured thereby may bring an action thereon in his own name against the officer and his sureties to recover the amuont to which he may be entitled by reason of such delinquency."

That the defendants are liable to the plaintiff in this action, that the facts are such as render the bond liable, appears sufficiently from cases recently decided in Oklahoma.

Mott et al. v. *Hull* (not officially reported), 152 Pac. 92.

Hixon v. *Cupp*, 5 Okla. 545, 49 Pac. 927.

State ex rel. v. *Am. Sur. Co.* (Idaho), 145 Pac. 1097.

And,

Same v. *Title & Guaranty Co.*, 152 Pac. 189 aff. here, 240 U. S. 136.

It is the generally recognized rule everywhere that a private person can recover from a public officer on his bond where the injured person has a direct interest in the duty to be performed and special damage has resulted to him from the failure of official action.

State v. *Lane* (Ind.), 111 N. E. 616.

But in Oklahoma, because the state administers the bank guaranty fund, the defendants below and here insist that the State of Oklahoma is an interested party.

The question is whether injurious breaches of the state banking laws by state officers acting under color of state power, which breaches are also violations of the Federal constitutional guaranties of the privileges and immunities of citizenship (Sec. 2, Art. 4) of equal protection of equal laws, and of property as against deprivation except by due process (Sec. 1, fourteenth amendment), may give rise to actions under the Revised Statutes of the United States, compiled 1913, Sec. 3932 (*Myers* v. *Anderson*, 238 U. S. 368).

The cases are the sequelæ of the *Lankford* v. *Platte Iron Wk.*, 235 U. S. 461, series of decisions.

They come to this court on writs of error from the United States District Court for the Western District of Oklahoma on certificates of a jurisdictional question (No. 368, p. 19; No. 369, p. 31), the lower court having upheld the contention of defendants in error, that jurisdiction was forbidden by the eleventh amendment to the Constitution of the United States, and dismissed the actions.

The two cases were argued together and involve the same point. The defendants in error contend that the cases fall within the ruling of the Lankford cases, *supra*, and are but an indirect attack upon the State of Oklahoma.

The plaintiffs in error contend, on the contrary, that the immunity granted the state does not extend to damage done by its officers, though acting under color of her authority, if illegally done.

Belknap v. *Schild*, 161 U. S. 10.
Hopkins v. *Clemson Agri. College*, 221 U. S. 636.

Unlike *Lankford* v. *Platte Iron Wks.*, no judgment is sought against the state's funds, or funds under its control, but only one against an individual who perpetrated this injury under the guise of state power. The state is not interested.

Reagan v. *Farmers Trust Co.*, 154 U. S. 263.

Jurisdiction of the case of Johnson rested on diversity of citizenship as well as the federal statutory and constitutional questions involved.

Edward F. Johnson, a citizen of Massachusetts, a depositor in an Oklahoma domestic bank, under the supervision of the bank commissioner, lost his deposit because the bank commissioner took possession of the assets of the failed bank as a receiver and proceeded, though thus himself interested, to determine without notice, hearing, evidence or opportunity for judicial review of his determination, to allow and disallow depositors' claims, and after allowing and paying claims of many depositors, citizens of Oklahoma, otherwise situated similar to Johnson, whose claim he arbitrarily and without legal justification disallowed, proceeded to impress the assets of the failed bank, with a first lien for amount he had allowed and paid.

This discrimination between Johnson and the Oklahoma citizens whose deposits were allowed was an infringement of Johnson's privilege and immunities as a

citizen of Massachusetts, against Sec. 2 of Art. 4 of the Constitution.

Blake v. *McClung*, 172 U. S. 339.

Even though the law was fair on its face, this administration was forbidden.

Yick Wo v. *Hopkins*, 118 U. S. 356.

And being a state officer in possession of state power, using the power to invade the Constitution, it was state action.

Home T. & T. Co. v. *Los Angeles*, 227 U. S. 278.

It also deprived Johnson of his property without due process: Because it entirely exhausted the debtor's assets everywhere, and the proceedings to determine the the lien therefor were by the bank commission, though a receiver (*Ward* v. *Oklahoma State Bank*, not yet officially reported, 151 Pac. 852; *Frisco* v. *Hammer et al.*, 150 Pac. 1101), acting as judge in his own case (*Peo. of N. Y.* v. *O'Brien*, 111 N. Y. 1, 18 N. E. 682).

Because there was no notice or hearing provided by law.

Coe v. *Armour Fertl. Wks.*, 237 U. S. 413.

Because there were no judicial proceedings to determine the lien, or opportunity for judicial review of the determination made.

Parson v. *Russell*, 11 Mich. 113.

Williams v. *Wedding et al.* (Ky.), 176 S. W. 1176.

The Matter of Empire State Bank, 18 N. Y. 199.

Further, there were allegations of neglect of supervision over the bank and its officers.

State ex rel. v. *Am. Sur. Co.,* 145 Pac. 1098.
Same v. *Title and Gar. Co.,* 152 Pac. 189 affirmed here, 240 U. S. 136.

Which, because of defendant's illegal disposition of the remaining assets, entirely destroyed plaintiffs' property.

Martin's case was like Johnson's, except that as a citizen of Oklahoma, within its jurisdiction, the discrimination in disallowing his deposits, and allowing those of others situated as he was, constituted a denial of the equal protection of the laws in violation of Sec. 1 of the fourteenth amendment.

Blake v. *McClung, supra.*

As to the right to judicial review.
C., M. & St. P. v. *Minn.,* 134 U. S. 418.
Mo. Pac. v. *Tucker,* 230 U. S. 337.
Foster v. *Scott,* 18 L. R. A. 543 (N. Y.).
Taylor v. *Anderson,* 137 Pac. 1183 (Okla.).

ARGUMENT.

We desire to examine and apply these cases.

In each of these petitions allegations are made that the defendant Lankford, acting as said bank commissioner and thus enforcing the law of the State of Oklahoma for it, has taken property without due process of law and has denied equal protection of the law, also in the Johnson case (No. 368), it is alleged, has abridged the privileges and immunities of a citizen of Massachusetts in the State of Oklahoma, and in the Martin case (No. 369), has abridged the privileges and immunities of a citizen of the United States within the jurisdiction of the State of Oklahoma. (No. 368, pp. 8, 9 and 13 and 14; No. 369, pp. 20, 21 and 26.)

These allegations create a federal right such as vest this court with jurisdiction.

Myers v. *Anderson*, 238 U. S. 368.

That was a case in which the ordinances of the City of Annapolis requiring registration were so enforced by the election officers as to deny negro voters the franchise. In it the court quotes and applies the Federal Statutes, Sec. 1779, Revised Statutes, Compiled Statutes 1713, Sec. 3932, as follows:

> "Every person who, under color of any statute, ordinance regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States, or any other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

This is clearly, therefore, a case in which a person,

to-wit: J. D. Lankford, under color of a statute, to-wit: the Oklahoma Bank Guaranty Law, subjects or causes to be subjected a citizen of the United States, that is, Johnson, in the one case, and Martin in the other, to the deprivation of rights, as well as privileges and immunities, in violation of the Federal Constitution.

First, let us consider the privileges and immunities. These were guaranteed to Johnson while in the State of Oklahoma by Sec. 2 of Art. 4 of the Constitution of the United States. They were guaranteed to Martin by the first section of the fourteenth amendment to the Constitution of the United States in two ways: First, that the privileges and immunities belonging to him as a citizen of the United States should not be abridged; and, second, that while within the jurisdiction of the State of Oklahoma the equal protection of the laws was guaranteed to him.

Furthermore, to both of them, Johnson and Martin, it was guaranteed by the fourteenth amendment that their property should not be taken without due process of law. This statute clothes the bank commissioner with authority to be receiver for failed banks, with authority to determine what deposits are owing by that failed bank, with authority to impose upon the assets of a failed bank a first lien for such advances as the state may through him make in payment of such deposits as he found were by the bank owing, and with authority to reject the claim of a depositor without giving to that depositor a judicial remedy for the determination either of the existence of his claim, or the correctness of the determination of the deposits of other persons and the consequent correctness of the amount of the first lien imposed on the assets of the bank. Whereas in this case such lien exhausts the assets of the failed bank, this determination deprives such rejected depositor of his property without due process of law because he has no

judicial remedy, because he has no notice or hearing provided by the law, because the bank commissioner, representing the state, cannot be invested with power of determining what the lien of the state is, and further, if the bank commissioner vested with authority under the law and given an opportunity to accept the deposits of one and reject the deposits of the other, if so administers the law as alleged here as to pay residents of the state and reject non-residents of the state, then the result is the same as if the law had discriminated against the non-residents, or so administers it as to accept one resident and reject another similarly situated, then he denies the equal protection of the law.

The decisions affirm clearly the meaning of the constitutional provisions to be that a state cannot grant a business privilege to its own citizens and deny that privilege to the citizens of another state, nor under unequal terms deny it to part of its own citizens.

Where these results do not appear on the face of the law and only the opportunity for this effect is by the law granted to its officers, if the officer charged with its enforcement so exercises his power as to produce the forbidden result, this comes within the prohibition of the constitutional provisions and the section of the Federal Statute first cited in the Maryland election cases applies. Though the law be fair on its face, yet if it be administered with an evil eye and unfairly, so as to work an oppressive and unjust result, and produce a discrimination or an abridgement of privileges, in such case, if such enforcement be through an officer acting under color of a state statute, even though the statute or the constitution of the state prohibit the doing of the very thing that the officer does, yet in such case this will be a breach of the constitutional inhibition sufficient that an action founded thereupon comes within the statute cited in the

Maryland election cases and constitutes a federal question.

This brings us now to a consideration of whether the allegations as to the enforcement of the law in the unequal manner stated in the petition amounts to an act of the state violative of the Constitution of the United States. Upon this head we are contented with the recent decision of *Home T. & T. Co.* v. *Los Angeles*, 227 U. S. 278. In that case it was claimed that the act of the town council in providing rights which were confiscatory were as much violative of the Constitution of the State of California as of the Constitution of the United States, and therefore it could not be stated that the officers of the town represented the state in the violation of the fourteenth amendment, but the court, speaking through the chief justice, said:

> "Where one who is in possession of state power uses that power to the doing of the wrongs which the amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong-doer."

It was a violation of the fourteenth amendment. Further, he said:

> "That is to say, the theory of the amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

He added:

> "* * * in truth the amendment contemplates

the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the amendment. In other words, the amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency."

Virginia v. *Rives*, 100 U. S. 313, is a case in point. There the enforcement by the state official of a statute in a discriminatory manner, although the statute was not inherently discriminating, yet such enforcement was within the amendment.

Also the case of *ex parte Va.*, 100 U. S. 339. The case of *Neal* v. *Delaware*, 103 U. S. 370, was one where a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the amendment.

The case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, is so appropriate that we desire to quote from it here again. Speaking for the court, Mr. Justice Matthews says:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Also the case of *Raymond* v. *Chicago Union Trac. Co.*, 207 U. S. 20. And finally, *ex parte Young*, 209 U. S. 123, to the same effect.

Upon this head we only desire to add three cases: First, the language used by Mr. Justice Brewer in *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 263, particularly at page 390.

The same contention was made in that case as in this that the state was interested and that contention was answered by him in these words:

> "There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes, illegal in whole or in part."

Further, then, he discusses whether the fact that the statute was constitutional upon its face, would that oust the federal court of its jurisdiction. He says:

> "A valid law may be wrongfully administered by officers of the state, and so as to make such a ministration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and

yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

A tax case of the kind just named is to be found in the celebrated case of *Nashville* v. *Taylor et al.*, 86 Fed. 168, pp. 184-5.

Lastly the decision of the Circuit Court of Appeals of the Sixth Circuit, upon which sat at the time Taft, Lurton and Clark, contained in the 96 Fed. 113, the opinion being by Taft. He cites with great industry all the various decisions bearing upon this matter, citing several that we have not already called attention to, but reaching the same conclusion, that the prohibition of the Constitution rested upon the state in all of its various agencies, legislative, executive and judicial, and rested as well upon the agencies of the state who under color of a valid law committed an unconstitutional trespass.

If, then, we have sufficiently established the fact that the administration of the law in the way alleged in the petition to have occurred, would be an action by the state, and the fact that the law was fair on its face, would not save the defendant in this case if his acts were tortious within the view of the constitutional limitations.

The next question is, would his acts if enacted into a statute, have been a breach of the Federal Constitution? Such a question was clearly presented and decided in the case of *Blake* v. *McClung*, 172 U. S. 339. Many cases were therein cited and a great deal of cogent argument and pertinent observations made. It will be sufficient,

however, for the purpose of this brief to say that a statute of Tennessee was examined that attempted to give residents of that state a preference as to the assets in Tennessee of foreign corporations which became insolvent in that state. This court noticed that if a resident of Ohio be denied a preference in the assets of a British corporation becoming insolvent in Tennessee, he could not do business in the State of Tennessee in competition with his Tennessee competitor and held that this would amount to an abridgement of the fundamental privileges of citizenship inhering to the citizens of Ohio when in the State of Tennessee, and for this reason held the statute bad. The case went back to the lower court and because this court had recognized that a foreign corporation was not a citizen with privileges and immunities, so that the statute might deny to a foreign corporation a privilege that it could not deny to a citizen of Ohio, it was claimed in the state court that the Tennessee citizens might share with all the other citizens in the property of a failed foreign corporation, and then be given a special preference in that portion of the assets of the corporation that could be denied to a foreign corporation.

This view was adopted by the Tennessee court in *McClung et al.* v. *Embreeville Co.*, 52 S. W. 1001. The case went again on appeal to this court and for the second time it was decided that any business privilege granted to a citizen of Tennessee must be granted to all citizens of other states that attempt to do business in Tennessee. This second holding is to be found in 176 U. S. 58.

It was followed in the later case of *Sully* v. *American National Bank*, 176 U. S. 289. It was also followed by the decision in the Circuit Court of Appeals of the First Circuit, 92 Fed. 100, and in a very carefully written opinion in the Circuit Court of the Sixth Circuit, where sat Taft, Lurton and Severens, the opinion written

by Taft, to be found 92 Fed. 435. Judge Taft in this careful opinion says that the meaning of Sec. 2, Art. 4 of the Constitution of the United States is that no business privilege must be granted by any state to its own citizens without granting the same to the citizens of other states. In other words, the State of Oklahoma might, if it wished to do so, grant a bonus to its citizens whereby it would take up and pay the deposits in failed banks in this state, but when it went a step further than the bonus and laid a lien upon the property of the failed bank to recoup to it the advances so by it to be made, and had that lien take precedence over the claims of other persons against the bank, this amounts to a business privilege and as long as it exists for the benefit of the Oklahoma citizen it exists as well for this Massachusetts citizen, and if it exists for one Oklahoma citizen, then it must exist for every other person, whether state citizen or not, who is within the jurisdiction of that state, that is, it must cover Martin, or otherwise he is denied the equal protection of the laws within the jurisdiction of that state.

State decisions to the same effect will be found in *State* v. *Montgomery* (Me.), 47 Atl. 165, where it was held that a peddler's license could not be granted to citizens and refused to aliens.

McMurray v. *Gedwell* (Ind.), 58 N. E. 722, in which it was held that a foreign building and loan association having already entered a state, a law was passed requiring a deposit of bond, etc., to be made by it, or else cease to do business in the state, it determined on the latter alternative and ceased to do business. It was held that its assets in the state must be subject in the same manner to the claims of all persons whether citizens of Indiana or not. It was recognized, as recognized by Judge Taft, that any fund that had been deposited in Indiana with the state authorities for the protection of the Indiana

citizens would have been a trust fund whose purposes might have been complied with, but as the assets of this company in Indiana were not of that character, it was held that no preference might be shown to the citizens of Indiana in them.

Further, we desire to make the point that under this law the bank commissioner is given the power of determining what claims shall be allowed and to impose a lien for the amount that he does allow, not only while he is receiver for such failed bank, not only without notice and a hearing, but also in addition to all of these objections, he determines the validity of such claims without any judicial hearing even before himself without the introduction of evidence and without any protection either to the claimants or to other parties by way of making a record for judicial review.

For a moment let us consider whether upon the very face of this statute giving as it does to the bank commissioner power to determine who are the depositors, and then the power to accept or reject a deposit, and then giving the same bank commissioner the power to place upon the assets of a failed bank a lien in the name of the state for the amount and for the deposits that he finds just—does not such a statute take the property of those claimants who are rejected, without due process of law, in that it invades the fundamental prohibition that one shall not be judge in his own case? The bank commissioner is to be the judge of whether there is a deposit and the amount of it; the bank commissioner thus fixes the amount of the state's lien, and the bank commissioner must enforce the state's lien. In other words, he has the power of deciding how much of a lien that shall be, and what shall not be in the way of that lien as against all persons whose deposits he rejects and as against all persons whose claims he hinders and delays by the asser-

tion of the lien. Such a statute constitutes him judge in his own case.

The Supreme Court of Oklahoma has held that the bank commissioner is as a receiver of failed banks. Such is the meaning of *Ward* v. *Oklahoma State Bank of Atoka*, not yet officially reported, decided September 14, 1915, 151 Pac. 852, where it was held that the bank commissioner did not take the assets of a failed bank as a purchaser for value. In that case the language of Brewer, commissioner, in *Briscoe* v. *Hamer*, 150 Pac. 1101, was quoted and approved. In that opinion Commissioner Brewer, speaking for the court, said: "It seems to us that the position of the bank commissioner in taking charge and collecting the assets of a failed bank is quite analogous to that of a receiver or trustee in bankruptcy or the assignee for the benefit of creditors."

We take it, therefore, that these two decisions have established as a settled law of the state that the bank commissioner in regard to the assets of a failed bank is as a receiver. Being such receiver, the statute attempts to vest him with power of determining also for whom he shall be receiver.

An analogous condition is to be found in the case of *People of the State of New York* v. *O'Brien*, 111 N. Y. 1, 18 N. E. 682, 2 L. R. A. 255. In that case a statute of the State of New York dissolved certain corporations, requiring that the attorney general bring an action to wind up their affairs and create a receiver to take possession of the assets of the corporation. It also provided that the receiver should be the referee to take proof of claims against the corporation and the judge to determine the materiality of evidence offered in their support. The court of appeals of that state held that this statute violated the rule that no man should be the judge

of his own case, and took the property of the rejected creditors without due process of law.

At page 268, in the 2 L. R. A., it is said by Judge Ruger, the chief justice:

> "But, assuming that the act was intended to apply, * * * we are of opinion that its material provisions are open to many serious objections, which cannot be obviated or reconciled with the provisions of the fundamental law. A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate, and reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case; and it is immaterial whether he is a party in his own right, or as trustee of an express trust. In either event, he is a party to the action, interested therein, and precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse judex in propria causa.*"

Another decision exactly in line with this is that of *Conklin, Treasurer,* v. *Squire,* 4 Ohio Dec. 493. By an Ohio statute tax inquisitors went before the county auditor and started procedure by which the auditor was to place omitted property on the tax rolls. The auditor was to give a hearing and determine whether and how much property had been omitted and receive 4 per cent of the taxes collected on such property. In denying the validity of such a law it was said:

> "The legislature has no power to authorize a

judge or other county officer, having an interest in the result of the case, to hear it, and the statute which seeks to do this is unconstitutional and of no effect."

Cooley on Constitutional Limitations, page 516, 4th edition, after reciting cases where the judge has a remote interest, says:

> "But except in cases resting upon such risks we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority because it is not the establishment of any rule of action and it is a placing of the party so far as that controversy is concerned out of the protection of the law and submitting him to the control of one to whose interest it will be to decide it arbitrarily and unjustly."

In Broom's Legal Maxims, under the maxim quoted, cases will be found in which this rule has been applied from the earliest times up to date.

A late instance not altogether unlike that of the Oklahoma law is the case of *Kelly et al.* v. *Lynchburg Co., et al.* (N. C.), 16 L. R. A. 514, where there was an agreement that arbitrators might fix their own compensation, and they did so, yet it was held that the compensation that they found due to themselves was subject to judicial correction because they could not, because of this maxim, decide in their own case.

Another similar and like case is *Piland* v. *Taylor et al.*, 18 S. E. 70, in which the clerk of the court was the grantee in a deed executed before his deputy. Under the law of North Carolina, it was held that the taking of the acknowledgment to the deed was a judicial act and that

the acknowledgment of this deed taken before the grantee's deputy was in effect taken before himself, that he could not judge in his own case and the deed therefore was void.

It is also to be noted that this determination by the bank commissioner acting as receiver and as judge in his own case is without any notice or hearing provided in the law. The fact that he may choose to grant a hearing or consideration which is extra-official, or casual, cannot change the condition. In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this rule was recently reaffirmed by this court.

Another recent case of a somewhat similar nature is that of *Williams et al.* v. *Wedding et al.*, 176 S. W. 1176, decided in the court of appeals of Kentucky. The act there authorized the drainage board to make certain assessments and did not provide for any judicial review of their action after a certain stage in the proceeding was reached, although their power to effect the amount of the taxes still might be exercised by them, modified and changed, it was held that this absence of power to examine judicially made the act unconstitutional.

An illustrative case is *Parsons* v. *Russell*, 11 Mich. 113. This case passed upon the boat law of Michigan. Supplies furnished were to be a lien on the boat. When such a lien was claimed and an application was made for the warrant, the application being verified and specifying the particulars of the demand, the warrant was then issued, the sheriff took the vessel and upon the return of the warrant a notice was published for twelve weeks requiring all persons claiming an interest therein to set it up within three months. If the claim is not satisfied within three months, the vessel is sold to satisfy it and the other liens that may have been filed. The court held that, "under the boat and vessel law of this state a

vessel may be seized and sold upon a mere assertion of the debt or demand without any proof to substantiate the claim being made before a judicial tribunal and without any judgment or decree of any such tribunal allowing the sale." It was therefore declared unconstitutional. This act was on the books for fifteen years and a number of cases arising under it had been heard and adjudged in the supreme court before this decision was rendered, yet it will be noted that it is altogether analogous with the condition in Oklahoma. The bank commissioner acting in his own case without notice to anybody, without a hearing to anybody, without evidence, without proof, decides what claims shall be allowed, he may, as he did in this case, allow all the claims to Oklahoma citizens, disallow the claims of Massachusetts citizens and even such as Martin, who, because he dealt with a Massachusetts citizen, may be regarded by the bank commissioner as a Massachusetts citizen, and therefore be rejected, and after having determined what allowance he shall make, and these become liens against the property, the property may be sold and the proceeds applied and no judicial hearing or determination allowed to any one.

Another case is that of the *Matter of Empire State Bank*, 18 N. Y. 199. Under the New York law the receiver of banks rendered to the justice of the supreme court of his district an account of the debts and the liabilities of all banks not satisfied and a list of the stockholders. The justice then referred the matter to the referee, and it was held that the receiver's statement as to the debts to be paid were not binding on the referee and among other reasons it was assigned the one that if it should be so construed, it would render it unconstitutional.

We are not contending that the Oklahoma Bank Guaranty Law is unconstitutional. We only insist that

the disallowance by the bank commissioner of a just claim made by him arbitrarily, without excuse, and in effect simply because the claimant is a citizen or Massachusetts, or formerly was from Massachusetts, amounts on his part to an act that is a breach, in the case of Johnson of Sec. 2, Art. 4, of the Constitution. and in the case of Martin of Sec. 1, fourteenth Amendment to the Constitution of the United States.

The unconstitutionality of the commissioner's actions arises from this. If sufficient assets of the corporation had been left to satisfy the plaintiffs' claims, they would not have been damaged at all, but coupled with the refusal to do what the Oklahoma law stated the bank commissioner should do toward their payment is the fact that the assertion of the lien, so unequally determined by Lankford, upon all the property of the bank has exhausted that property and has damaged Johnson and Martin to the full value of their claims and interest and to that extent, therefore, the unconstitutionality of the action of Lankford falls under the statute cited in the Maryland election cases, and this is a case where a person, to-wit: Lankford, under color of a statute, to-wit: the Oklahoma Bank Guaranty Law, subjects or causes to be subjected, a citizen of the United States, that is, Johnson and Martin, to the deprivation of his rights, privileges and immunities. In such case the federal statutes say such injuring person shall be liable to the party injured in an action at law.

Further, patently, both Johnson and Martin had valid causes of action similar to *State of Idaho et al.* v. *Title & Sec. Co.*, 240 U. S. 136.

As to Johnson, diversity of citizenship gave the lower court jurisdiction.

Accordingly we pray that the cases be remanded with directions to overrule the motion to dismiss and proceed further.

Respectfully submitted,

CHAS. WEST,

For Plaintiffs in Error Johnson and Martin.

MARTIN *v.* LANKFORD ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 97. Submitted December 18, 1917.—Decided January 28, 1918.

This action was similar to *Johnson* v. *Lankford*, *ante*, 541. Here, however, plaintiff sought damages measured by the excess of his claims as depositor over his liability as a stockholder of the bank; and there was not diverse citizenship. *Held*, (1) that the action was not against the State but against the defendant Bank Commissioner personally (and his surety) because of his alleged tortious conduct in violating the state law, and (2) that allegations to the effect that by the Commissioner's wrongful administration of the state law plaintiff's privileges and immunities were abridged and his property taken without due process, in violation of the Constitution, were to be taken as in emphasis of the Commissioner's wrongdoing, not as an

independent ground of recovery; and, in the absence of diverse citizenship, the District Court lacked jurisdiction.
Affirmed.

THE case is stated in the opinion.

Mr. Charles West for plaintiff in error, contended in this and the *Johnson Case, ante*, 541, (with which it was presented,) that the conduct of Lankford, besides constituting a breach of duty under the state law, was at the same time in violation of the Federal Constitution, and gave rise to a federal cause of action under Rev. Stats., § 1979, *Myers* v. *Anderson*, 238 U. S. 368. Further, that, done under color of the state law, the conduct amounted to unconstitutional state action, though the law itself was not subject to objection, and that the defendant, guilty of such conduct, became personally liable as a violator of the plaintiffs' privileges and immunities and their rights to due process and equal protection of law, citing *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Ex parte Young*, 209 U. S. 123; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Nashville* v. *Taylor*, 86 Fed. Rep. 168, 184, 185; *Iron Mountain R. Co. of Memphis* v. *City of Memphis*, 96 Fed. Rep. 113; and other authorities. Upon this ground it was sought to sustain the District Court's jurisdiction in the absence of diverse citizenship.

No brief filed for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The action is in certain particulars similiar to No. 96, *ante*, 541, and was submitted with it. The citizenship of the parties, however, is not diverse as in the other action, they being all citizens of Oklahoma. There is a further

difference from the other action in that in the latter the plaintiff was a depositor in the bank while in this he is a stockholder as well as a depositor and seeks to have his stockholder's liability of $2,000 offset against any sums that may be owing to him by reason of the matters set forth in his petition, Lankford, as bank commissioner, having refused to do so. Wherein and wherefore Lankford should have done so and wherein and wherefore he violated his duty to plaintiff through wrongful and neglectful conduct is charged in three causes of action substantially the same as the petition in No. 96, varied only to suit the differences in demand. In other words, that plaintiff lost his deposit because of neglect of duty upon the part of Lankford in the following particulars: (1) Failure to exercise proper supervision over the bank as directed by the statute of the State. (2) Allowing the parties in charge of the bank to squander its assets. (3) Allowing it to continue business while and after its reserve was greatly less than required by law. (4) Allowing its managers continuously and repeatedly to make excessive loans and permit excessive overdrafts. (5) Allowing such managers to remain in charge of its affairs, knowing them to be incompetent and notwithstanding it was his duty to discover such incompetency and, upon discovery, to take possession of the bank for the protection of its depositors and stockholders.

Plaintiff hence prayed that his stockholder's liability of $2,000 be offset against the sums due him and for recovery of the overplus, which he alleged to be $6,669.25, and interest thereon.

The Attorney General of the State appeared specially and alleged that the State "is a necessary party in interest to a proper determination of the issues described in the plaintiff's petition," that it "does not consent to be sued in this cause, and objects to this action being maintained against it." The motion concluded as follows:—"Wherefore, the State of Oklahoma moves the court to dismiss this

action for want of jurisdiction over the party defendant."

Thereupon, by permission of the court, plaintiff inserted at the end of each cause of action an amendment in substance as follows: That the enforcement of the law of the State through Lankford, as bank commissioner, abridges plaintiff's privileges and immunities as a citizen of the United States in that Lankford allowed and paid out of the assets of the bank and out of the Guaranty Fund the deposits of other persons similarly situated with plaintiff and refused arbitrarily to pay his, plaintiff's, deposit. And by the imposition of the lien on the assets of the bank by the State for the sums advanced by it to the payment of such other depositors postpones and prevents the collection of plaintiff's deposit because the amount so advanced is greater than the assets, and that plaintiff was entitled to the same treatment as other depositors.

The court then passed upon the motion to dismiss and granted it, reciting that the question of jurisdiction was alone involved.

The petition charges delinquency on the part of Lankford whereby the bank's officers were enabled to so conduct its affairs as to bring it to insolvency, making it necessary for him to take possession of it with its assets depleted. The petition also charges such conduct after he took possession as to subordinate plaintiff's claim to that of other depositors in the same situation. His conduct in this last particular, it is said, was in violation of the equal protection and due process clauses of the Constitution of the United States.

We assume that the amendment to the petition which charges that the lien of the State upon the assets of the bank was so enforced as to give other depositors a preference was intended to be but another way of asserting violation of the Constitution, not by the law of the State, but by the wrongful administration of the law by Lank-

ford. Indeed the petition negatives state action. It is based, as we have seen, upon the tortious conduct of Lankford, not in exertion of the state law but in violation of it. The reasoning of No. 96 is therefore applicable and the conclusion must be the same, that is, the action is not one against the State, and the District Court erred in dismissing it for want of jurisdiction on that ground.

We say "on that ground," for we are brought to the consideration whether the judgment of dismissal can be sustained upon another ground. There is confusion in the petition and the argument used to support it. As we have seen, Lankford is charged with dereliction of duty whereby plaintiff in error has been injured; but there is an assignment of error based upon the due process and other clauses of the Constitution of the United States. They were violated, the assignment recites, by Lankford's conduct by which other depositors were preferred to plaintiff, and the decision was "without evidence, without notice, without a hearing provided by law, without an opportunity afforded by law for judicial review"; and that the District Court erred in deciding that "the consequent action based upon said facts against" Lankford and the insurance company as his surety "was in effect one against the State of Oklahoma."

In No. 96 we said of a like allegation that it was only possible to regard it as emphasis of Lankford's wrongdoing, not as an independent ground of recovery. To hold otherwise would be to disregard the whole scheme of plaintiff's petition which is, as we have seen, a cause of action against Lankford because of his derelictions. This being the nature of the action, the District Court erred in regarding it as one against the State and dismissing it on that ground. But, however, its judgment was right, plaintiff and Lankford being citizens of the same State, and the Surety Insurance Company being an Oklahoma corporation, and therefore the judgment must be affirmed. *Affirmed.*